DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1274
Title: Marc J. Gabelli and Bruce Alpert, Petitioners
v.
Securities and Exchange Commission
Docketed: April 24, 2012
Linked with 11A755
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (10-3581-cv, 10-3628-cv, 10-3760-cv)
Decision Date: August 1, 2011
Rehearing Denied: November 22, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 6 2012	Application (11A755) to extend the time to file a petition for a writ of certiorari from February 20, 2012 to March 22, 2012, submitted to Justice Ginsburg.
Feb 10 2012	Application (11A755) granted by Justice Ginsburg extending the time to file until March 22, 2012.
Mar 2 2012	Application (11A755) to extend further the time from March 22, 2012 to April 20, 2012, submitted to Justice Ginsburg.
Mar 7 2012	Application (11A755) granted by Justice Ginsburg extending the time to file until April 20, 2012.
Apr 20 2012	Petition for a writ of certiorari filed. (Response due May 24, 2012)
May 15 2012	Order extending time to file response to petition to and including June 25, 2012.
Jun 14 2012	Order further extending time to file response to petition to and including July 25, 2012.
Jul 25 2012	Brief of respondent Securities and Exchange Commission in opposition filed.
Aug 8 2012	DISTRIBUTED for Conference of September 24, 2012.
Aug 14 2012	Reply of petitioners Marc J. Gabelli and Bruce Alpert filed. (Distributed)
Sep 10 2012	Supplemental brief of petitioner Marc J. Gabelli and Bruce Alpert filed. (Distributed)
Sep 21 2012	Supplemental brief of petitioner Marc J. Gabelli and Bruce Alpert filed. (Distributed) (Second Supplemental)
Sep 25 2012	Petition GRANTED.
Oct 31 2012	SET FOR ARGUMENT ON Tuesday, January 8, 2013.
Nov 2 2012	Consent to the filing of amicus curiae briefs, in suport of either party or of neither party, received from the Solicitor General on behalf of the respondent.
Nov 5 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Nov 9 2012	Joint appendix filed. (Statement of costs filed)

Nov 9 2012	Brief of petitioners Marc J. Gabelli and Bruce Alpert filed.
Nov 13 2012	Record from the U.S.D.C. for the Southern District of New York is electronic.
Nov 16 2012	CIRCULATED.
Nov 16 2012	Brief amicus curiae of Association of the Bar of the City of New York filed. (Distributed)
Nov 16 2012	Brief amicus curiae of American Bankers Association filed. (Distributed)
Nov 16 2012	Brief amici curiae of Securities Industry and Financial Markets Association, et al. filed. (Distributed)
Nov 16 2012	Brief amicus curiae of Cato Institute filed. (Distributed)
Nov 16 2012	Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)
Nov 16 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Nov 21 2012	Motion for leave to file amici brief out of time filed by Former SEC Commissioners and Officials.
Dec 3 2012	Motion for leave to file amici brief out of time filed by Former SEC Commissioners and Officials GRANTED.
Dec 4 2012	Record from U.S.C.A. for 2nd Circuit is electronic.
Dec 7 2012	Brief amicus curiae of Occupy the SEC filed. (Distributed)
Dec 10 2012	Brief of respondent Securities and Exchange Commission filed. (Distributed)
Dec 26 2012	Reply brief of petitioners Marc J. Gabelli and Bruce Alpert filed. (Distributed)
Jan 7 2013	Letter from counsel for petitioners Marc J. Gabelli and Bruce Alpert filed. (Distributed)
Jan 8 2013	Argued. For petitioners: Lewis J. Liman, New York, N.Y. For respondent: Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

FILED
APR 2 0 2012
OFFICE OF THE CLERK

No. 11-1274

IN THE

Supreme Court of the United States

MARC J. GABELLI and BRUCE ALPERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
212-698-3500

Lewis J. Liman
Counsel of Record
Katherine Wilson-Milne
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000

Counsel for Petitioners

April 20, 2012

QUESTION PRESENTED

Section 2462 of Title 28 of the United States Code provides that "except as otherwise provided by Act of Congress" *any* penalty action brought by the government must be "commenced within five years from the date when the claims first *accrued*." (emphasis added). This Court has explained that "[i]n common parlance a right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954).

Where Congress has not enacted a separate controlling provision, does the government's claim first accrue for purposes of applying the five-year limitations period under 28 U.S.C. § 2462 when the government can first bring an action for a penalty?

LIST OF PARTIES

The parties to the proceedings are listed in the caption of the decision of the United States Court of Appeals for the Second Circuit. Pet. App. 1a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	9
I. CIRCUIT COURTS ARE SPLIT ON THE MEANING OF "ACCRUE" UNDER SECTION 2462	13
II. THE DECISION OF THE COURT OF APPEALS MISAPPREHENDS THE DECISIONS OF THIS COURT AND RAISES ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT	19

Page

III. THE QUESTION WHETHER A DISCOVERY RULE APPLIES TO SECTION 2462 IS OF SWEEPING SCOPE AND IMPORTANCE WARRANTING REVIEW BY THIS COURT 27

CONCLUSION 36

APPENDICES

Opinion of the United States Court of Appeals for the Second Circuit decided August 1, 2011 .....1a-23a

Mandate Order of the United States Court of Appeals for the Second Circuit filed November 30, 2011 .....24a-25a

Memorandum and Order of the United States District Court for the Southern District of New York filed March 17, 2010 .....26a-51a

Order of the United States Court of Appeals for the Second Circuit filed November 22, 2011 .....52a-53a

TABLE OF AUTHORITIES

Page(s)

Rules and Statutes

17 C.F.R. § 240.10b-5 28
7 U.S.C. § 6c(b) 35
15 U.S.C. § 77m 3
15 U.S.C. § 77o 35
15 U.S.C. §77q 28
15 U.S.C. § 77q(a) 35
15 U.S.C. § 77www(a) 4
15 U.S.C. § 78i(f) 5
15 U.S.C. § 78j(b) 35
15 U.S.C. § 78m 35
15 U.S.C. § 78r 5
15 U.S.C. § 78t(a) 35
15 U.S.C. § 78t(e) 35
15 U.S.C. § 80b-6(1) and (2) 2
15 U.S.C. § 80b-7 35
26 U.S.C. § 6700 35
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1658 ..... 3, 21
28 U.S.C. § 1658(b) 24
28 U.S.C. § 2462 ..... *passim*
40 U.S.C. § 123 35

Page(s)

Cases

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) .....*passim*

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805)
(Marshall, C.J.) 29

Ainbinder v. Kelleher,
No. 92 Civ. 7315 (SS), 1997 WL 420279
(S.D.N.Y. July 25, 1997) 31

Astra USA, Inc. v. Santa Clara Cnty.,
131 S. Ct. 1342 (2011)..... 34

Bailey v. Glover,
88 U.S. 342 (1874).....22, 23-24, 31

Bank of the U.S. v. Daniel,
37 U.S. (12 Pet.) 32 (1838) 20

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 21

BP Am. Prod. Co. v. Burton,
549 U.S. 84 (2006)..... 30

Cent. Bank of Denver, N.A. v.
First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 21

Credit Suisse Securities (USA) LLC v.
Simmonds,
566 U.S. ___, No. 10-1261, Slip Op.
(Mar. 26, 2012) .....*passim*

Page(s)

Dommert v. Raymond James Fin. Servs., Inc.,
No. 1:06-CV-102, 2009 WL 275440
(E.D. Tex. Feb. 3, 2009) 22

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 21

Evans v. Gee,
36 U.S. (11 Pet.) 80 (1837) 20

Exploration Co. v. United States,
247 U.S. 435 (1918) 24

FEC v. Williams,
104 F.3d 237 (9th Cir. 1996) 13, 17

Hennegan v. Pacifico Creative Serv. Inc.,
787 F.2d 1299 (9th Cir. 1986) 32

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 31

In re Linerboard Antitrust Litig.
Winoff Indus., Inc.,
305 F.3d 145 (3d Cir. 2002),
cert. denied, 538 U.S. 977 (2003) 32

Janus Capital Grp., Inc. v.
First Derivative Traders,
131 S. Ct. 2296 (2011) 34

Jay E. Hayden Found. v. First Neighbor
Bank, N.A.,
610 F.3d 382 (7th Cir. 2010) 32

Page(s)

Kahn v. Kohlberg, Kravis, Roberts & Co.,
970 F.2d 1030 (2d Cir. 1992) 21-22

Kleinman v. Oak Assocs., Ltd.,
No. 5:07-CV-0698, 2007 WL 2071968
(N.D. Ohio July 16, 2007) 22

Lancashire Shipping Co. v. Durning,
98 F.2d 751 (2d Cir. 1938)..... 13

Merck & Co. v. Reynolds,
130 S. Ct. 1784 (2010) 22, 24, 25, 30

Meredith v. United States,
38 U.S. (13 Pet.) 486 (1839)..... 20

New York v. Hendrickson Bros., Inc.,
840 F.2d 1065 (2d Cir. 1988) 32

Order of R.R. Telegraphers v.
Ry. Express Agency,
321 U.S. 342 (1944)..... 30

Phoenix Four, Inc. v. Strategic Res. Corp.,
No. 05 Civ. 4837 (HB), 2006 WL 399396
(S.D.N.Y. Feb. 21, 2006) 22

Pinter v. Dahl,
486 U.S. 622 (1988)..... 21

Purdy v. Zeldes,
337 F.3d 253 (2d Cir. 2003)..... 8

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963)..... 28

Page(s)

SEC v. Jones,
476 F. Supp. 2d 374 (S.D.N.Y. 2007)..... 22

SEC v. Koenig,
557 F.3d 736 (7th Cir. 2009) 11, 14, 18

SEC v. Miller,
No. Civ.A. 1:04CV1655-JEC,
2006 WL 2189697
(N.D. Ga. July 31, 2006) 11

Smith v. United States,
143 F.2d 228 (9th Cir. 1944)..... 13

Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 21, 34

The Ng Ka Py Cases,
24 F.2d 772, 774 (9th Cir. 1928) 13

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 21

Trawinski v. United Techs.,
313 F.3d 1295 (11th Cir. 2002)..... 13

TRW, Inc. v. Andrews,
534 U.S. 19 (2001)..... 30, 34

United States v. Ancorp Nat'l Servs., Inc.,
516 F.2d 198 (2d Cir. 1975) 13

United States v. Athlone Indus., Inc.,
746 F.2d 977 (3d Cir. 1984) 13

Page(s)

United States v. Brockamp,
519 U.S. 347 (1997) 22

United States v. Core Labs., Inc.,
759 F.2d 480 (5th Cir. 1985) 13, 15-16, 29

United States v. Home Concrete & Supply, LLC,
132 S.Ct. 71 (2011)..... 30

United States v. Johnson,
529 U.S. 53 (2000)..... 22

United States v. Lindsay,
346 U.S. 568 (1954) .....i, 19-20

United States v. Maillard,
26 F. Cas. 1140 (S.D.N.Y. 1871) 13

United States v. Mayo,
26 F. Cas. 1230 (C.C.D. Mass. 1813)..... 29

United States v. Midwest Generation, LLC,
781 F. Supp. 2d 677 (N.D. Ill. 2011) 14

United States v. Rutherford Oil Corp.,
756 F. Supp. 2d 782 (S.D. Tex. 2010)..... 14

United States v. Witherspoon,
211 F.2d 858 (6th Cir. 1954).....13, 17-18

W. Pac. Fisheries, Inc. v. S.S. President Grant,
730 F.2d 1280 (9th Cir. 1984) 13

Wilcox v. Plummer,
29 U.S. (4 Pet.) 172 (1830) 20

Page(s)

William A. Graham Co. v. Haughey,
646 F.3d 138 (3d Cir. 2011) 15, 25, 32-33

Other Authorities

1 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 142 (1886)..... 20

1 BOUBIER'S LAW DICTIONARY 66 (1897)..... 20

AMERICAN HERITAGE DICTIONARY 12 (3d ed. 1994)..... 20

BLACK'S LAW DICTIONARY 23 (9th ed. 2009) .. 20

H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 274 (3d ed. 1901)..... 34

Merriam-Webster.com, *available at* http://www.merriam-webster.com 20

In re Flanagan, Release No. 160, 2000 WL 98210 (SEC Jan. 31, 2000)..... 7

Offers of Exch. Involving Registered Open-End Inv. Cos. & Unit Inv. Trusts, Release No. 16504, 1988 WL 1000029 (SEC July 29, 1988)... 7

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marc J. Gabelli and Bruce N. Alpert respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit permitting the United States Securities and Exchange Commission ("SEC") to seek penalties against Petitioners for conduct that was not fraudulently concealed and that had ceased more than five years before the SEC brought suit. In the alternative, Petitioners respectfully request the Court grant this petition for certiorari, vacate the decision below and remand the case to the court of appeals for reconsideration in light of this Court's recent decision in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012).

OPINIONS BELOW

The opinion of the court of appeals is reported at 653 F.3d 49. Pet. App. 1a. The order of the court of appeals denying the petition for rehearing and rehearing *en banc* (Pet. App. 52a) is unreported. The mandate of the court of appeals has not been issued, pending the filing of this Petition. Pet. App. 24a. The opinion of the district court (Pet. App. 26a) is unreported.

JURISDICTION

The decision of the court of appeals was issued on August 1, 2011. A petition for rehearing and rehearing *en banc* was denied on November 22, 2011. Pet. App. 52a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2462 of Title 28 of the United States Code provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(1) and (2), provides in relevant part:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> 1. to employ any device, scheme, or artifice to defraud any client or prospective client; [or]

> 2. to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client . . .

The Sarbanes-Oxley Act of 2002, 28 U.S.C. § 1658, provides:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c (a)(47)), may be brought not later than the earlier of—
>
> > (1) 2 years after the discovery of the facts constituting the violation; or
> >
> > (2) 5 years after such violation.

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, provides:

> No action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exer-

> cise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.

The Securities Act, 15 U.S.C. § 77www(a), provides in relevant part:

> Any person who shall make or cause to be made any statement in any application, report, or document filed with the Commission pursuant to any provisions of this subchapter, or any rule, regulation, or order thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who shall omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall be liable . . . . No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 9(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(f), provides in relevant part:

> Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. . . . No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 18(c) of the Exchange Act of 1934, 15 U.S.C. § 78r, provides in relevant part:

> (c) Period of limitations
>
> No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

STATEMENT OF THE CASE

This case raises an important and recurring question of statutory construction regarding the accrual of claims governed by 28 U.S.C. § 2462, the statute of limitations applicable to all civil penalty actions brought by the government.

In April 2008, the SEC filed a civil complaint in the United States District Court for the Southern District of New York, asserting against Petitioner Gabelli claims under the Investment Advisers Act ("IAA") and against Petitioner Alpert claims under the IAA as well as under the Securities Act and Exchange Act. On June 15, 2010, the SEC filed an amended complaint asserting the same claims (the "Complaint").

The Complaint sought penalties against Petitioners for conduct that had ended more than five years before the SEC brought suit and of which the SEC had been aware for more than five years before it brought suit. In brief, the Complaint alleged that Gabelli Funds, LLC ("Gabelli Funds"), an investment adviser under the IAA, negligently or intentionally violated Section 206 of the IAA by accepting a small investment in a Gabelli hedge fund in exchange for permitting a customer to engage in allegedly harmful trading in a mutual fund it managed (Gabelli Global Growth Fund or "GGGF"), without disclosing that investment to Gabelli Funds' board of directors. Pet. App. 8a. The Complaint charged Gabelli and Alpert—respectively a GGGF portfolio manager and the Chief Oper-

ating Officer of Gabelli Funds—with aiding and abetting that conduct. Pet. App. 8a-9a.[1]

The trading at issue—known as mutual fund market timing—has long been known to the SEC. In fact, the SEC made an affirmative decision not to regulate it as early as the late 1980s and certainly by the end of the 1990s. *See Offers of Exch. Involving Registered Open-End Inv. Cos. & Unit Inv. Trusts*, Release No. 16504, 1988 WL 1000029, at *17 (SEC July 29, 1988); *In re Flanagan*, Release No. 160, 2000 WL 98210, at *5 (SEC Jan. 31, 2000). Gabelli Funds is a registered investment advisor and is subject to regular examinations by the SEC. The Complaint alleged that Gabelli Funds accepted the investment starting in 1999 and permitted the trading until August 2002, when it demanded that the trading stop. Pet. App. 6a; Compl. ¶¶20-28. The SEC commenced its investigation one year later, in the Fall of 2003, immediately after the New York Attorney General publicized a widespread investigation of mutual fund market-timing. Compl. ¶46. However, despite the fact that the SEC asked petitioners for tolling agreements and those tolling agreements had expired, the SEC waited to file its complaint until April 24, 2008—more than five years after the *last* conduct alleged to be unlawful, even excluding the time period covered under the

[1] In addition, the SEC alleged Alpert misrepresented the activity in a September 2003 online memorandum in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, as well as Rule 10b-5. Pet. App. 8a-9a. Those allegations are not at issue here.

tolling agreements. Pet. App. 32a. Even though the Complaint was filed more than five years after the SEC's claim first accrued, the SEC sought civil monetary penalties as relief, in addition to disgorgement and an injunction. Pet. App. 10a; Compl. ¶¶ 20-28.

Petitioners moved to dismiss the claim for penalties, arguing that the SEC's claim "first accrued" as early as September 1999, when it first could have sued and no later than August 7, 2002, when the conduct ended and that its claim therefore was untimely. Pet. App. 26a. The district court agreed. The court held, in relevant part, that the five-year limitations period in 28 U.S.C. § 2462 governed the civil monetary penalties sought by the SEC and that, in the absence of a statute to the contrary, "the discovery rule does not apply to claims subject to the limitations of § 2462." Pet. App. 36a. Moreover, the court held that the SEC could not seek refuge in the doctrine of fraudulent concealment, as it had failed to "allege with particularity under Rule 9(b) what acts Defendants took, beyond the alleged acts of wrongdoing themselves, or what contrivance or scheme was designed to mask the SEC's causes of action." Pet. App. 39a.[2]

The court of appeals reversed. Pet. App. 1a. The court held, among other things, that a discovery

[2] After the district court dismissed the majority of the claims, the SEC filed a motion to dismiss voluntarily its claim for disgorgement without prejudice to refiling if the SEC were successful on appeal. Pet. App. 11a. *See Purdy v. Zeldes*, 337 F.3d 253, 257-58 (2d Cir. 2003).

rule should be read into Section 2462 for all claims that "sound in fraud," including those brought under the IAA. The court did not identify any statute that on its face provided an exception to Section 2462's command that a penalty claim must be brought within five years of the claim accruing. Rather, it concluded, as a categorical matter, that when a claim sounds in fraud it need not be brought until it is discovered or should have been discovered by the government. The SEC did not argue—and the court did not hold—that Petitioners had engaged in fraudulent concealment.[3] Rather, the court stated that the discovery rule applied even when the defendants did not engage in concealing conduct or conduct to frustrate the bringing of a timely claim. Pet. App. 18a-22a (citing *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), and *Bailey v. Glover*, 88 U.S. 342 (1874)).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision conflicts with the decisions of at least four other circuit courts, which since 1928 have construed the language of 28 U.S.C. § 2462 to require the government to bring a penalty claim within five years of the date the cause of action arose, and addresses a question raised but not definitively answered by a fifth circuit court. The decision also neglects relevant hold-

[3] The district court had ruled that they did not. On appeal, the SEC dropped its fraudulent concealment argument. Brief of Plaintiff-Appellant at 35, *SEC v. Gabelli*, No. 10-3581 (2d Cir. Oct. 29, 2010).

ings of this Court interpreting the term "accrue"—including the intervening precedent created by this Court in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012), which has legal bearing on this case—and misapprehends this Court's decisions holding that, only under limited circumstances where a defendant has engaged in inequitable conduct, the time for the government to bring a claim for damages or restitutionary relief is tolled.

The decision below is predicated on the notion that, regardless of whether a congressional statute so provides, when a claim for penalties is brought under a statute that "sounds in fraud," the claim does not accrue and the statute of limitations does not begin to run until the government discovers or should have discovered the claim. That interpretation cannot be squared with the plain language of Section 2462 and arrogates to the judiciary a power—defining the statute of limitations—that Congress expressly has reserved to itself. For more than 150 years, this Court has defined "first accrue" to mean the date when a cause of action first arises. An action for civil penalties must be brought within five years from the date of violation. Any intervening time after the violation, and until an action is brought, counts against the government and not against the allegedly offending defendant.

Until the decision of the court below, no appellate court had ever held that the government can maintain the right to bring a penalty claim against

a defendant long after the five-year period has expired where the defendant has not frustrated the bringing of a timely claim.[4] The decision of the court below is also inconsistent with this Court's decisions regarding statutes of limitations as a general matter.

For the more than 150 years that Section 2462 and its predecessors have existed, all federal agencies that seek to bring a penalty claim have been subject to a clear rule: unless the defendant has engaged in conduct to conceal his own wrongdoing and thus to frustrate the bringing of a timely claim, or unless Congress provides otherwise, the agency must bring a penalty claim within five years of when the violation first occurred and the agency first had a legal right to sue.

The contrary rule would overturn that clear mandate and the principles of repose that it furthers. This Court has recognized that statutes of limitations are an essential component of a functioning and just legal system. They have been applied to even the most abhorrent of offenses (not at issue here) under the theory that every defendant has a right to defend himself with evidence that has not become stale or gone missing. Under the approach

---

[4] What scant authority might be read to support the court of appeals' decision comes from unreported district court cases with no reasoning or description of the actual conduct at issue, *see, e.g.*, *SEC v. Miller*, No. Civ.A. 1:04CV1655-JEC, 2006 WL 2189697 (N.D. Ga. July 31, 2006), or involves overtly concealing conduct by the defendants, as in *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009). *See infra* p. 18.

taken by the SEC and the court below, even when a defendant has not engaged in concealing conduct and equitable tolling does not apply, the SEC would be able to bring an ancient claim on the mere allegation that it did not discover and could not have discovered the violation earlier. If adopted, a federal agency could bring, and sustain, a penalty action for stale, wholly unconcealed, conduct on the sole basis that it chose not to pursue an investigation earlier, unless the defendant makes the showing by a preponderance of the evidence that the agency knew or should have known of the violation earlier. Such a showing could not easily be made on the government's pleadings and would be virtually impossible to make in practice until after the destruction of a defendant's reputation and the expenditure of substantial legal fees. This is an unreasonable burden for a defendant to bear, particularly in cases that do not necessarily involve fraud, but only "sound in fraud" and involve the sort of negligent conduct that is addressed by the SEC's claim under Section 206(2) of the IAA.

The correct application of the statute of limitations in government penalty actions implicates vitally important principles of repose and separation of powers. The question whether a statutory limitations period can be extended by courts without Congress' permission has been addressed by several other courts of appeals, as well as by this Court. Thus, a well developed conflict exists and is ripe for resolution by this Court.

I. CIRCUIT COURTS ARE SPLIT ON THE MEANING OF "ACCRUE" UNDER SECTION 2462

The Second Circuit's holding creates a circuit split with respect to the question of how to interpret the limitations period for government penalty actions set forth in Section 2462. At least four circuit courts have unambiguously read the term "accrual" as used in Section 2462 to refer to the date of the underlying violation, and, thus, have required the government to bring a penalty claim within five years of the earliest date on which it could sue absent a statute expressly providing otherwise. *See 3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *United States v. Core Labs., Inc.*, 759 F.2d 480, 482 (5th Cir. 1985); *United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954).[5] The Seventh Circuit has also addressed this

[5] Many more courts have reached analogous conclusions. *See, e.g., Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 982 n.1 (3d Cir. 1984); *W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1287 (9th Cir. 1984); *United States v. Ancorp Nat'l Servs., Inc.*, 516 F.2d 198, 200 n.5 (2d Cir. 1975); *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944) (construing predecessor statute); *Lancashire Shipping Co. v. Durning*, 98 F.2d 751 (2d Cir. 1938) (same); *The Ng Ka Py Cases*, 24 F.2d 772, 774 (9th Cir. 1928) (same); *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871) (construing predecessor statute and holding "[the claim] did so accrue, as against the defendants in this case, when the offenses alleged were committed . . . . [I]gnorance does not prevent the running of the statute or the accruing of the forfeiture.").

issue, suggesting that either the discovery rule or equitable tolling may apply to claims subject to Section 2462 without conclusively ruling which of these two doctrines courts may employ. *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009). Only the court of appeals below explicitly has adopted the novel position that the accrual of a penalty claim is deferred until its discovery by a government agency.

This proposition has been squarely rejected.[6] In *3M Co. v. Browner*, the D.C. Circuit held that the Environmental Protection Agency ("EPA") could not bring an action seeking penalties under the Toxic Substances Control Act for conduct that occurred more than five years earlier. The defendant there filed a certification that the Act's requirements were met without providing the required notice to the EPA of a new and imported chemical. 17 F.3d at 1454. The government argued that its belated penalty action was timely because the nature of the violation was such that it could not have been discovered earlier. It argued that a discovery rule should be read into Section 2462, delaying accrual. The D.C. Circuit rejected that argument. It held that under Section 2462, a claim

---

[6] *See also United States v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782, 788 (S.D. Tex. 2010) (observing that rejection of discovery rule is consistent with the general rule that a cause of action "'accrues when it comes into existence'" (quoting *United States v. Lindsay*, 346 U.S. 568, 568 (1954))); *United States v. Midwest Generation, LLC*, 781 F. Supp. 2d 677, 692-93 (N.D. Ill. 2011) (same).

accrues "when the factual and legal prerequisites for filing suit are in place." *Id.* at 1460. Accordingly, the EPA's action was untimely.

In so holding, the D.C. Circuit rejected the government's argument for a discovery rule, reasoning among other things that the discovery rule is based on the principle "that plaintiffs cannot have a tenable claim for the recovery of *damages* unless and until they have been harmed," and that the rule has "only been applied to remedial, civil claims" where damages or other remedial relief are sought and never to a penalty claim. *Id.* at 1460 (emphasis added) (citing long line of circuit court cases applying the discovery rule to civil remedial claims); *see also William A. Graham Co. v. Haughey*, 646 F.3d 138, 150 (3d Cir. 2011) (holding the discovery rule "is grounded in the notion that it is unfair to deny relief to someone who has suffered an injury but who has not learned of it"). The court noted that the rule has "nothing whatever to do" with penalty claims, since "injuries or damages resulting from the violation are not part of [a punitive] cause of action." *3M*, 17 F.3d at 1460; *see also id.* ("The rationale underlying the discovery [] rule—that a claim cannot realistically be said to accrue until the claimant has suffered harm—is completely inapposite" to a punitive claim.).

Likewise, in *United States v. Core Laboratories, Inc.*, the Fifth Circuit held that the Commerce Department could not bring a penalty action for violations of the Export Administration Act ("EAA") more than five years after the last alleged-

ly unlawful act. 759 F.2d at 481. The conduct at issue there was inherently secretive—a violation of the anti-boycott provisions of the EAA. The court held, however, that a claim under Section 2462 "accrues at the time of the underlying violation." *Id.* at 483. Surveying case law reaching as far back as 1904, the court concluded that "[a] review of [cases involving Section 2462 and its predecessors] demonstrates that the date of the underlying *violation* has been accepted without question as the date when the claim first accrued." *Id.* at 482 (citing case law) (emphasis added). The court stated that while "[t]here are exceptions to [the rule that claims accrue at the time of a violation], . . . where the Congress has meant to make such exceptions, it has clearly expressed that intent." *Id.* at 483-84. The court noted that a rule that would not permit the statute to begin running "is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them," and that "[r]espondent would leave the statute open for that portion of eternity concurrent with the [defendant's] life, whether he lives three score and ten or as long as Methuselah." *Id.* at 483 n.2 (quoting *Badaracco v. Comm'r*, 464 U.S. 386, 406 (1984) (Stevens, J., dissenting)). The court left open the possibility that equitable tolling might apply if some sort of deceptive conduct were present, and held that the meaning of "accrue" for *all* claims subject to Section 2462 refers to the time of violation. 759 F.2d at 483.

In *FEC v. Williams*, the Ninth Circuit too agreed with *3M* in "reject[ing] the application of the discovery rule to the running of limitations periods under 2462." 104 F.3d at 240. There, the Federal Election Commission ("FEC") sought civil penalties against the defendant for secretly funneling money to a presidential campaign in violation of the Federal Election Campaign Act. Notably, the FEC alleged the defendant had concealed his conduct, and argued that both the discovery rule and fraudulent concealment applied. The court held that the discovery rule was inapplicable to Section 2462. Separately recognizing that the underlying conduct involved false statements to the government that might have frustrated the ability to bring a timely claim, the court held that the impact of such conduct should be determined under the law of fraudulent concealment and not by reading a discovery rule into a statute where Congress had not done so. *Id.* at 241.

Further, in *United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954), the Sixth Circuit held that the government was time-barred from bringing a penalty claim for all but one violation of the Surplus Property Act because the other alleged violations occurred more than five years before the government's complaint was filed and no statute suspended the running of the statute of limitations. The underlying statute there, as well as the conduct, explicitly sounded in fraud. In relevant part, it targeted, "[e]very person who shall use . . . any fraudulent trick, scheme, or device, for purpose

of securing or obtaining . . . any payment, property, or other benefits from the United States or any Federal agency." *Id.* at 860. Nonetheless, because Section 2462 applied and "[t]he complaint [] was filed more than five years after the last alleged act of fraud, . . . the government's action was commenced too late." *Id.* at 861.

Finally, in *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009), the Seventh Circuit staked out a third position in this debate, further supporting the need for this Court's review. Considering a claim that an SEC penalty action was untimely where the defendant had misstated his company's biannual statements and thereafter had lied to the company's auditors to conceal this fraud, the court there held that based on principles it stated were "apt to be called equitable tolling," *id.* at 739, but could also be called a discovery rule, the SEC made sufficient allegations of the defendant's concealing conduct to permit the SEC to go forward with its penalty claim.[7]

The court below asserted that its decision did not create a conflict with these cases because it was considering a statute that "sounds in fraud." Pet App. 18a-20a. But that is a distinction without a difference. Each of the cases referenced above involved conduct that could be said to "sound in

[7] Indeed, in *Koenig* the defendant did not argue that a diligent effort by the SEC would have uncovered the alleged fraud which had "fooled . . . outside accountant (Arthur Andersen), which knew a great deal more than the SEC about the firm's finances." 557 F.3d at 740.

fraud" under statutes that sounded in fraud. Indeed, some of them involved explicitly "concealing" conduct. These courts did not reject the government's claim based on the character of the underlying statute, but rather based on the fact that the claim was brought more than five years after the claim arose and, as here, that Congress did not "otherwise provide" a different statute of limitations. The statute in *Witherspoon* explicitly refers to fraud, making the court of appeals' rule even more untenable, and the other underlying statutes involve misleading or secretive conduct considered by each court.

II. THE DECISION OF THE COURT OF APPEALS MISAPPREHENDS THE DECISIONS OF THIS COURT AND RAISES ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT

The language of Section 2462, read both in isolation and in context, is clear and unambiguous: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of *any* civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim *first accrued* . . . ." 28 U.S.C. § 2462 (emphasis added).

This Court has held—in a decision the court below ignored—that "[i]n common parlance a right accrues when it comes into existence." *United*

States v. Lindsay, 346 U.S. 568, 569 (1954). This settled definition accords with that of numerous dictionaries.[8] It also was well accepted in the Nineteenth Century when the first predecessor statute to Section 2462 was enacted.[9]

Congress explicitly legislated a discovery rule in the federal securities laws when it wanted the courts to apply such a rule, providing that the discovery rule would apply to "a private right of

---

[8] *See* BLACK'S LAW DICTIONARY 23 (9th ed. 2009) (defining accrue to mean "to come into existence as an enforceable claim or right; to arise"); THE AMERICAN HERITAGE DICTIONARY 12 (3d ed. 1994) (defining accrue as "[t]o come into existence as a claim that is legally enforceable"); Merriam-Webster.com, *available at* http://www.merriam-webster.com (Aug. 7, 2011) (defining accrue as "[t]o come into existence as a legally enforceable claim"); 1 BOUBIER'S LAW DICTIONARY 66 (1897) (defining accrue as "[t]o arise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has accrued."); 1 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 142 (1886) (stating that a "[c]ause of Action shall accrue or shall have accrued. . . . whenever the defendant's liability became perfect and complete.").

[9] *See Meredith v. United States*, 38 U.S. (13 Pet.) 486, 493-94 (1839) (duties accrue to government at time when goods arrive at their port of entry, not when government knows they are there); *Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838) ("cause of action to recover the money, (had it been well founded) accrued at the time the mistaken payment was made"); *Evans v. Gee*, 36 U.S. (11 Pet.) 80, 84 (1837) ("A refusal to accept [a good in exchange for payment] is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee."); *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172, 181 (1830) (holding that claim accrues at the moment a violation occurs).

action" and not to a governmental penalty action and "[e]xcept as otherwise provided by law, a civil action [under the federal securities laws] may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658. Indeed, it explicitly distinguished between "discovery" and "accrual." *Id.* There is no room in Section 2462 or the federal securities laws to find a discovery rule for penalty actions under the IAA. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (where a provision "is flanked by provisions of the 1934 Act that explicitly grant private causes of action" it indicates that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 209-10 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) (holding that a private securities plaintiff cannot maintain a claim where he neither bought nor sold the security, because "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly"); *see also Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so."); *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) ("When Congress wished to create such liability, it had little trouble doing so").[10]

[10] Courts have long recognized that IAA claims accrue at the time of violation. *See, e.g., Kahn v. Kohlberg, Kravis,*

The court of appeals also did contortions around Section 2462's structure, which provides that a civil penalty claim cannot be brought more than five years after the claim comes into existence, except where "the offender or the property is" not "found within the United States in order that proper service may be made thereon." 28 U.S.C. § 2462. Where Congress lists exceptions in a statute it is inappropriate for courts to imply any others. *United States v. Johnson*, 529 U.S. 53, 58 (2000); *see United States v. Brockamp*, 519 U.S. 347, 352 (1997).

The court below nonetheless felt compelled to read "discovery" into the meaning of "first accrue" not because of any statute but rather based on a misreading of this Court's decisions in *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1793-94 (2010), and *Bailey v. Glover*, 88 U.S. 342 (1874). *Bailey* and *Merck*

Roberts & Co., 970 F.2d 1030, 1042 (2d Cir. 1992) (holding that cause of action under the IAA accrued "when the agreements were entered into."); *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007) (SEC's IAA claim time-barred under Section 2462 where claim was filed "six years after the alleged wrongdoing"); *see also Dommert v. Raymond James Fin. Servs., Inc.*, No. 1:06-CV-102, 2009 WL 275440, at *6 (E.D. Tex. Feb. 3, 2009) (IAA claim "accru[ed] from the opening of the IAS Account and execution of the Agreement in May 1998 through the cancellation and closing of that Account"); *Kleinman v. Oak Assocs., Ltd.*, No. 5:07-CV-0698, 2007 WL 2071968, at *3 (N.D. Ohio July 16, 2007) ("[A]n illegal clause in a contract harms an investor at the time the contract is executed."); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837 (HB), 2006 WL 399396, at *6 (S.D.N.Y. Feb. 21, 2006) ("[A]n action for rescission [under the IAA] accrues when the contract is executed.").

did not involve Section 2462, the discovery rule, or a governmental action for a penalty. Neither case is fairly read to give a court license to read a "discovery rule" into Section 2462 absent a statute expressly providing such a rule.

Bailey v. Glover involved a claim where the government—as a stakeholder—sought a ruling that a common law fraudulent conveyance effected outside the otherwise applicable statute of limitations be set aside under the Bankruptcy Act where the defendant's conduct had frustrated its ability to bring a timely claim. 88 U.S. at 342. The court of appeals and the SEC rely on *Bailey* for one isolated passage describing the appellant's position in that case: "when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it." *Id.* at 348. The Court did not create a categorical rule applicable to *all* statutes that sound in fraud. What the Court actually stated was that:

> [W]e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and *when the fraud has been concealed, or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

88 U.S. at 349-50 (emphasis added). Thus, the *Bailey* Court held that the government (sitting in the shoes of a private stakeholder) was entitled to the same rule where, on the particular facts: (1) the defendant has engaged in fraud *and* (2) the particular fraud involves deliberate concealment that prevents the discovery of a claim during the otherwise applicable statute of limitations. *See also Exploration Co. v. United States*, 247 U.S. 435, 449 (1918) (holding that government could obtain equitable relief of rescinding fraudulently obtained land patent after statute of limitations had run, reasoning that "[w]e cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government").

The court of appeals' reliance on *Merck & Co. v. Reynolds*, 130 S. Ct. at 1793-94, is even further afield, and highlights the mischief in the court's construction of Section 2462. *Merck* "concern[ed] the timeliness of a complaint filed in a private securities fraud action" brought by investors alleging that Merck had "knowingly misrepresented the risks of heart attacks accompanying the use of Merck's pain-killing drug, Vioxx." *Id.* at 1789-90. The applicable statute of limitations contained an explicit discovery rule, stating the claim was timely if brought within the earlier of "2 years after the discovery of the facts constituting the violation" and "5 years after such violation." 28 U.S.C. § 1658(b). The primary dispute in the case was whether the "facts constituting the violation" included scien-

ter, an essential element of the claim. Indeed, *Merck* could not have consciously delineated the contours of an implied discovery rule applicable to government penalty claims, as the "discovery rule" at issue in *Merck* bore no relation to such a rule. The case concerned an explicit, statutorily provided discovery rule coupled with a statute of repose that operated to *shorten* the time for a private plaintiff to bring a claim. Thus, as the Court noted, it dealt "with a statute, not a court-created exception to a statute." *Merck*, 130 S. Ct. at 1797. *See Graham*, 646 F.3d at 149 ("*Merck* was not concerned with the precise mechanics of the discovery rule" and "did not turn on 'the difference between tolling and delayed accrual.'").[11]

Even apart from the court of appeals' misapplication of *Bailey* and *Merck*, its decision cannot be reconciled with this Court's intervening decision in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012). In *Simmonds* this Court considered whether the two-year limitations period applicable to actions brought against corporate insiders for realizing profits from the purchase and sale of a corporation's securities under Section 16(b) of the Exchange Act, 15 U.S.C. § 78p(b), began to run upon the filing of the disclosure statement required

---

[11] *See also Merck*, 130 S. Ct. at 1793 ("The parties and the Solicitor General agree that § 1658(b)(1)'s word 'discovery' refers not only to a plaintiff's *actual* discovery of certain facts, but also to the facts that a reasonably diligent plaintiff would have discovered.").

by Section 16(b) by the insider *or*, as the statute specified, within "two years after the date such profit was realized." *Id.* at 1. This Court held that the plain language of the statutory limitations period was controlling and that the date any profit was "realized" was the controlling date, not the date of a later required filing as the court of appeals had held. *Simmonds* held that the court of appeals' adoption of a novel tolling provision into statutory text was wholly inappropriate:

> Simmonds . . . disregards the most glaring indication that Congress did not intend that the limitations period be categorically tolled until the statement is filed: *The limitations provision does not say so.* This fact alone is reason enough to reject a departure from settled equitable-tolling principles.

Id. at 7 (emphasis added). Thus, the Court rejected a court-created exception to clear statutory text directly analogous to the rule created by the court of appeals below.

The *Simmonds* Court further explained that even if the accepted doctrine of equitable tolling for fraudulent concealment might operate to toll the applicable limitations period, the judicially invented tolling doctrine at issue was "completely divorced from long-settled equitable-tolling principles." *Id.* at 5. These principles require the "litigant seeking equitable tolling [to] *bear[] the burden* of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstances stood in his way." *Id.* (emphasis added) (internal citation omitted). Because the court of appeals had adopted an automatic tolling period and not based its decision on Simmond's demonstration that the insiders had fraudulently concealed their unlawful conduct, this Court vacated the decision below and remanded "for the lower courts to consider how the usual rules of equitable tolling apply to the facts of this case." *Id.* at 8. *Simmonds* also explained that the doctrine of fraudulent concealment was the only appropriate basis for avoiding a statutory limitations period where Congress had not specified otherwise, and that this doctrine was fully capable of handling the problem of unavailable evidence or deceit raised by a securities plaintiff. *Id.* at 6-7 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 368 (1991), and *Bailey*, 88 U.S. at 348). Notably, here, the SEC has not even argued that extraordinary circumstances stood in its way.

III. THE QUESTION WHETHER A DISCOVERY RULE APPLIES TO SECTION 2462 IS OF SWEEPING SCOPE AND IMPORTANCE WARRANTING REVIEW BY THIS COURT

The question whether a discovery rule should be read into Section 2462 is of sweeping scope and importance. That is because Section "2462, is a general statute of limitations, applicable . . . to the entire federal government in all civil penalty

cases, unless Congress specifically provides otherwise." *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

The federal securities laws include numerous provisions that could be considered to "sound in fraud," regulating a broad range of economic activity. They range from statutes governing trading to those addressing books and records and securities offerings. *See, e.g.*, 17 C.F.R. § 240.10b-5; 15 U.S.C. §77q; *see also infra* p. 35 note 15. Some require proof of deception and intent; others—such as the IAA statute at issue here—require proof of neither. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963) (Section 206 of IAA addresses "all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."). An implied discovery rule in enforcement cases would relieve an agency, as a categorical matter, from its obligation to bring a timely case for all these claims and any other claims brought under a statute that "sounds in fraud," regardless of whether the violation was self-concealing or the defendant concealed it, and would place the burden on defendant to prove as a factual matter that the SEC should have discovered the violation earlier. As this Court held, "[t]he potential for such endless tolling in cases in which a reasonably diligent plaintiff would know of the facts underlying the action is out of step with the purpose of limitations periods in general." *Simmonds*, slip op. at 6.

Such a judicially implied rule would defeat the legislative judgment in Section 2462 that there comes a time (whenever that may be) when "the right to be free of stale claims, . . . prevail[s] over the right to prosecute them." *Core Labs.*, 759 F.2d at 483; *see also 3M*, 17 F.3d at 1457. As Chief Justice Marshall observed long ago, the concept that there would in effect be no limitations period for a penalty action "would be utterly repugnant to the genius of our laws . . . where not even treason can be prosecuted after a lapse of three years." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.); *accord United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15755) (Story J.) ("it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence"). This Court recently, and explicitly, affirmed this view in *Simmonds*. Slip op. at 6 ("Allowing tolling to continue beyond the point at which a §16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable* and inconsistent with the general purpose of statutes of limitations: 'to protect defendants against stale or unduly delayed claims.'") (citation omitted).

The court of appeals decision effectively allows the government to defer the commencement of Section 2462's limitations period indefinitely, until the government chooses to look for—and therefore finds—a violation, reversing the ordinary presumption that one has a right to be free of stale claims and undermining the core purposes of statutes of

limitations. This is just the type of issue implicating core principles of repose that the Court has consistently deemed merited review. *See, e.g., id.*; *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 71 (2011); *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006); *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001); *3M*, 17 F.3d 1453.

Statutes of limitations, including Section 2462, also are designed to protect a defendant from having to defend against a claim after "evidence has been lost, memories have faded, and witnesses have disappeared." *See Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944) (explaining that to defend a stale penalty claim is in conflict with core legal principles). It may be that a defendant who personally has concealed her wrongdoing to prevent a claim from being timely brought should not be heard to complain when—after her concealment has ceased to be effective—the claim is brought. She has effectively forfeited her right to rely on the statute of limitations and cannot justifiably complain that she is being subjected to stale claims because the delay is of her own manufacture.

Here, however, the SEC did not claim on appeal that Petitioners concealed their misconduct. The SEC claimed only that it could not have discovered the violation earlier. But the SEC's "failure to detect violations" is not Petitioners' fault and "does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions

brought decades after alleged violations are finally discovered." *3M*, 17 F.3d at 1461. Yet, under the Second Circuit's discovery rule, claims could be brought—and would need to be defended—regardless of how ancient the evidence unless the *defendant* could show (at summary judgment or trial) that the SEC failed to discover the evidence earlier with reasonable diligence.

The rule adopted by the court below thus focuses the statute of limitations inquiry on the wrong question. Both the equitable tolling and fraudulent concealment doctrines are based on the principle that when a defendant engages in a self-concealing fraud or deliberately frustrates the plaintiff's ability to bring a timely action she may not then use the plaintiff's failure to comply with the statute of limitations offensively to defeat an action after her misconduct is discovered. *See Bailey*, 88 U.S. at 349 ("To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."); *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946) (same); *Ainbinder v. Kelleher*, No. 92 Civ. 7315 (SS), 1997 WL 420279, at *6 (S.D.N.Y. July 25, 1997) (Sotomayor, D.J.) (observing that the "doctrine of equitable tolling developed in the context of fraud actions" exists to protect a "plaintiff who is unaware that he has a cause of action

because of defendant's fraudulent acts or concealment") (quotation omitted).[12]

The discovery rule is quite distinct from those equitable doctrines. That rule applies—as here—even where the defendant has not engaged in concealing or inequitable conduct.[13] In latent tort and certain other non-penalty civil cases where injuries are difficult to detect and damages or other remedial relief are an element of the claim itself, some courts and legislatures have suspended the accrual of a claim until the date harm has been felt on the theory "that plaintiffs cannot have a tenable claim for the recovery of damages unless and until they have been harmed." *3M Co.*, 17 F.3d at 1460; *see also William A.*

---

[12] *See, e.g., In re Linerboard Antitrust Litig. Winoff Indus., Inc.*, 305 F.3d 145, 163 (3d Cir. 2002) ("It is the fact of *concealment* that is the polestar in an analysis of fraudulent concealment. It is the camouflage that demands attention, the cover up, the acts of obscuring or masking."), *cert. denied*, 538 U.S. 977 (2003); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988) (requiring that plaintiff establish "that the defendant concealed from him the existence of his cause of action"); *see also Hennegan v. Pacifico Creative Serv. Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986) (rejecting fraudulent concealment where plaintiffs "have not alleged specific facts showing that the [defendants] engaged in affirmative conduct that fraudulently conceal[ing] the existence of a cause of action.").

[13] There are important practical differences between the doctrines of tolling and discovery as well. For example, some courts have held that equitable tolling provides only the additional time needed for a plaintiff to file a complaint. It does not delay accrual giving a plaintiff the entire limitations period. *See, e.g., Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 387 (7th Cir. 2010).

Graham Co. v. Haughey, 646 F.3d 138, 150 (3d Cir. 2011). *This* discovery rule has no application to government penalty actions, where harm is not an element of the claim and where the government will discover a violation only if and when it undertakes an investigation.

The court of appeals' decision creating a discovery rule under Section 2462 also runs afoul of the separation of powers. Congress, of course, may "Act" by determining that, because a particular claim is sufficiently difficult to discover, or its enforcement is sufficiently important, a longer limitations period should apply. But, as the D.C. Circuit has held, such a judgment necessarily implicates questions of policy and resource allocation that our Constitution assigns for debate in the halls of Congress, not determination in a court of law:

> An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others.

3M, 17 F.3d at 1461. Indeed, the question whether to "strike the balance between remediation of all

injuries and a policy of repose" by adding a new discovery rule to a statute of limitations is "properly directed not to [the courts], but to Congress, whose job it is to decide how . . . to strike the balance between remediation of all injuries and a policy of repose." *TRW, Inc. v. Andrews*, 534 U.S. 19, 38 (2001) (Scalia J., concurring); *see Simmonds*, slip op. at 6-7 ("Had Congress intended this result, it most certainly would have said so."); H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 274, at 651 (3d ed. 1901) ("[W]hen the courts engraft upon these statutes [of limitations] exceptions which the statute does not make or warrant, its action is nothing more nor less than an assumption of legislative functions.").[14]

The court of appeals' decision will inevitably involve the courts in intractable—and constitutionally inappropriate—case-by-case policymaking in determining which statutes sound in fraud and fall within the scope of its judicially fashioned discovery rule, and which do not. That question is frequently not susceptible of ready answer. Some statutes administered by government agencies

[14] These concerns are also salient in the Court's implied rights jurisprudence. *See Stoneridge*, 552 U.S. at 773 (The "requirement of congressional intent [for implied rights of action] 'reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.'") (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990)); *see also Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301-03 (2011); *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1347 (2011).

explicitly use the word fraud; others address conduct that arguably fits within the broad definition of fraudulent or deceptive conduct.[15]

The courts of appeals have issued conflicting decisions over whether a discovery rule applies to delay accrual of a claim subject to Section 2462's five-year statute of limitations and the decision below conflicts with decisions of this Court and raises important questions of federal law. Accordingly, the question this petition presents warrants this Court's review.

---

[15] *See, e.g.*, Internal Revenue Code, 26 U.S.C. § 6700 (imposing penalty on "any person who . . . makes . . . a statement with respect to the allowability of any . . . tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter . . ."); 40 U.S.C. § 123 (empowering the federal government to collect civil penalties where a person "uses or causes to be used, or enters into an agreement, combination, or conspiracy to use or cause to be used, a fraudulent trick, scheme, or device for the purpose of obtaining or aiding to obtain, for any person, money, property, or other benefit from the Federal Government."); 7 U.S.C. § 6c(b) (including certain prohibitions on fraud in commodities transactions); 15 U.S.C. § 78j(b) (Section 10(b) governing fraud in connection with purchase or sale of securities); 15 U.S.C. § 78t(e) (aiding and abetting violation of antifraud provisions of 1934 Act); 15 U.S.C. § 78t(a) (controlling persons liability under 1934 Act); 15 U.S.C. § 77o (controlling persons liability under 1933 Act); 15 U.S.C. § 77q(a) (1933 Act provision governing fraud or deceit in securities transactions); 15 U.S.C. § 78m (1934 Act provision prohibiting, among other things, falsity in certain public company books and records); 15 U.S.C. § 80b-7 (Section 207 of the IAA governing material misrepresentation in reports).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, Petitioners request the petition be granted and the decision below vacated and remanded for reconsideration by the court of appeals in light of this Court's recent decision in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012).

Respectfully submitted,

/s/ Lewis J. Liman
LEWIS J. LIMAN
Counsel of Record
KATHERINE WILSON-MILNE
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

EDWARD A. MCDONALD
KATHLEEN N. MASSEY
JOSHUA I. SHERMAN
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500

Counsel for Petitioners

April 20, 2012

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2010

(Argued: June 2, 2011 Decided: August 1, 2011)

Docket Nos. 10-3581-cv(L), 10-3628-cv(XAP), 10-3760-cv (XAP)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant/Cross-Appellee,

—against—

MARC J. GABELLI and BRUCE ALPERT,

Defendants-Appellees/Cross-Appellants.

Before: LIVINGSTON and CHIN, *Circuit Judges*, and RAKOFF, *District Judge*.*

Appeal from a final order and judgment of the United States District Court for the Southern District of New York granting in part defendants' motions to dismiss. REVERSED.

DOMINICK V. FREDA (Jacob H. Stillman, Hope Hall Augustini, *on the brief*), Secu-

---

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

rities and Exchange Commission, Washington, D.C., *for Plaintiff-Appellant.*

LEWIS J. LIMAN (Kimberly C. Spiering, Katherine L. Wilson-Milne, David R. Lurie, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, New York, *for Defendant-Appellee Gabelli.*

KATHLEEN N. MASSEY (Edward A. McDonald, Joshua I. Sherman, *on the brief*), Dechert LLP, New York, New York, *for Defendant-Appellee Alpert.*

RAKOFF, *District Judge.*

Plaintiff-appellant the Securities and Exchange Commission ("SEC") appeals from a judgment entered August 17, 2010, dismissing the SEC's complaint against Marc J. Gabelli, the portfolio manager of the mutual fund Gabelli Global Growth Fund ("GGGF" or the "Fund"), and Bruce Alpert, the chief operating officer for the Fund's adviser, Gabelli Funds, LLC ("Gabelli Funds" or the "Adviser"). For the following reasons, we REVERSE the District Court's judgment and REMAND for further proceedings consistent with this opinion.[1]

BACKGROUND

Unless otherwise noted, the following facts are taken from the complaint and are presumed to be

[1] Defendants Gabelli and Alpert have each filed cross-appeals, but for the reasons stated herein we do not reach the cross-appeals.

true. In essence, the SEC's complaint charges defendants with failing to disclose favorable treatment accorded one GGGF investor in preference to other investors: specifically, the fact that Gabelli Funds, investor adviser to GGGF, while prohibiting most GGGF investors from engaging in a form of short-term trading called "market timing," secretly permitted one investor to market time the Fund in exchange for an investment in a hedge fund managed by Gabelli. Compl. ¶¶ 1, 20-21, 17, 31, 35-38, 42, 44-45.

A. Market Timing

"Market timing" refers, *inter alia*, to buying and selling mutual fund shares in a manner designed to exploit short-term pricing inefficiencies. *See* Exemptive Rule Amendments of 2004: The Independent Chair Condition (Apr. 2005) ("Staff Report"), *available at* http://www.sec.gov/news/studies/indchair.pdf. A mutual fund sells and redeems its shares based on the fund's net asset value ("NAV") for that day, which is usually calculated at the close of the U.S. markets at 4:00 P.M. Eastern Time. Prior to 4:00 P.M., market timers either buy or redeem a fund's shares if they believe that the fund's last NAV is "stale," *i.e.*, that it lags behind the current value of a fund's portfolio of securities as priced earlier in the day. The market timers can then reverse the transaction at the start of the next day and make a quick profit with relatively little risk.

Mutual funds like GGGF that invest in overseas securities are especially vulnerable to a kind of market timing known as "time zone arbitrage," whereby market timers take advantage of the fact that the foreign markets on which such funds' portfolios of securities trade have already closed (thereby setting the closing prices for the underlying securities) before the close of U.S. markets.[2] Market timers profit from purchasing or redeeming fund shares based on events occurring after foreign market closing prices are established, but before the events have been reflected in the fund's NAV. In order to turn a quick profit, market timers then reverse their positions by either redeeming or purchasing the fund's shares the next day when the events are reflected in the NAV.

---

[2] An illustration of time zone arbitrage is provided in the SEC's complaint:

> For example, a U.S. mutual fund may hold shares of a Japanese company traded on the Tokyo Stock Exchange ("TSE"). Because of the time-zone difference, the TSE may close at 2:00 a.m. EST. If the U.S. mutual fund uses the TSE closing price for the Japanese company's stock to calculate the mutual fund's NAV at 4:00 p.m. EST, that fund's NAV will be based, at least partially, on market information that is fourteen hours old. Positive market movements during the New York trading day, which will later cause the Japanese market to rise when it opens at 8 p.m. EST, will not be incorporated into the fund's NAV, thereby cause the NAV to be artificially low. On such a day, a trader who buys the U.S. fund at the artificially low or "stale" price can realize a profit the next day by selling the U.S. fund's shares.

See Compl. ¶17.

Although market timing is not itself illegal, market timing can harm long-term investors in the fund by "rais[ing] transaction costs for a fund, disrupt[ing] the fund's stated portfolio management strategy, requir[ing] a fund to maintain an elevated cash position [to satisfy redemption requests], . . . result[ing] in lost opportunity costs and forced liquidations . . . unwanted taxable capital gains for fund shareholders and [a reduction of] the fund's long term performance." *Id.* at 32-33. *See also Janus Capital Grp. Inc. v. First Derivative Traders*, __ U.S. __, 131 S. Ct. 2296, 2300 (2011) ("Although market timing is legal, it harms other investors in the mutual fund.").

B. The Parties

Gabelli Funds, an investment adviser within the meaning of Section 2(a)(20) of the Investment Company Act of 1940 and Section 202(a)(11) of the Investment Advisers Act of 1940 (the "Advisers Act"), is the investment adviser to GGGF, an open end investment company, or mutual fund, registered under the Investment Company Act. Compl. ¶¶ 12-13. Marc Gabelli was the portfolio manager for GGGF and its predecessor fund from 1997 to 2004 and also managed several Gabelli-affiliated hedge funds. *Id.* ¶ 10. From 1988 to 2003, Bruce Alpert was Gabelli Funds' chief operating officer and the person who directed the Adviser's "market timing police," a group of GGGF employees that monitored trading in the Adviser's mutual funds in order to restrict market timing. *Id.* ¶¶ 1, 11, 31.

Najy N. Nasser was the chief investment adviser to Folkes Asset Management, now called Headstart Advisers Ltd. ("Headstart"). *Id.* ¶¶ 1, 10.

C. The Alleged Misconduct

The complaint alleges that from 1999 until 2002, Gabelli and Alpert permitted Headstart to engage in time zone arbitrage (which defendants referred to as "scalping") that took advantage of stale pricing opportunities in GGGF. *Id.* ¶¶ 17, 36, 42. Initially the amount of such scalping was limited, but on April 7, 2000, Gabelli allegedly agreed to permit Headstart to increase its market timing capacity from $7 million to $20 million, in exchange for a $1 million investment by Headstart in a hedge fund that Gabelli managed. *Id.* ¶ 21. Headstart's $1 million investment, which constituted approximately four percent of Gabelli's hedge fund's assets, was made the day after Headstart's increase in market timing. *Id.* ¶ 23.

Between April 2000 and the Spring of 2002, Headstart's increased market timing in GGGF's shares regularly involved between four and fifteen percent of GGGF's assets. *Id.* ¶ 24. Eventually, however, following instructions from the Fund's parent company, Gabelli and Alpert caused Headstart to reduce its ownership in GGGF and, in August 2002, to cease its market timing activity, whereupon Headstart redeemed its remaining investment in Gabelli's hedge fund. *Id.* ¶¶ 25-28.

Prior to the cessation, however, and during the same period that Gabelli and Alpert were approv-

ing Headstart's market timing in GGGF shares, Alpert and Gabelli banned at least 48 other GGGF accounts from market timing and rejected market timing purchases totaling at least $23 million. *Id.* ¶ 35. As early as December 2000, Alpert drafted an internal memorandum that explained that since "Market Timers (scalpers) have been using the International and Global Funds in a way that is disruptive to the Fund and the management of the portfolio," the Adviser was making efforts to "identify each account and restrict them for purchasing the funds." *Id.* ¶ 31. For the next two years, "market timing police"—employees instructed by Alpert to monitor market timing activity within Gabelli Funds—reviewed purchases in global funds: if it appeared that the purchase was a market timing trade, the purchase was rejected and sometimes the account was banned from making future purchases. *Id.* Yet, during the very same period, Alpert instructed the market timing police to ignore Headstart's market timing activity because "it was a Marc Gabelli client relationship," and assured Nasser that Headstart's accounts would not be blocked. *Id.* ¶¶ 33, 35.

According to the complaint, Headstart's market timing unfairly favored Headstart over all other GGGF investors. Thus, while Headstart's three accounts that market timed GGGF shares during the relevant period earned rates of return of 185 percent, 160 percent, and 73 percent, respectively, the rate of return for all other GGGF shareholders over the same period was, at best, negative 24.1 percent. *Id.* ¶¶ 2, 39. Headstart's market timing

also caused annual dilution ranging from one to four percent of GGGF's assets. *Id.*

While Headstart was market timing GGGF, the defendants allegedly did not disclose to GGGF's Board of Directors or to the other GGGF shareholders that Headstart was market timing, that it was being given an advantage accorded no other shareholder, and that there was a conflict of interest created by the agreement with Headstart. As a result, the Board was allegedly misled into believing that the Adviser was taking all necessary steps to reduce or ban market timing activity in general. *Id.* ¶¶ 36-38. For example, on February 21, 2001, Alpert and Gabelli attended a GGGF Board meeting where they each addressed the Board. Alpert told the Board about the dangers of market timing and the efforts that Gabelli Funds was undertaking to eliminate this practice, but failed to disclose that Headstart was being permitted to market time GGGF. Immediately after Alpert's report, Gabelli reported on operations of GGGF, but also failed to disclose Headstart's market timing. After the meeting, Alpert and Gabelli continued to allow Headstart to engage in market timing trades.

According to the complaint, even after the market timing ceased, the defendants continued to mislead the Board and GGGF investors. In particular, on September 3, 2003—the same day that the New York Attorney General announced he was investigating market timing in mutual funds—Alpert, in an alleged effort to reassure GGGF investors, posted a memorandum (the "Memorandum") on the

website of Gabelli Funds' parent company. *Id.* ¶¶ 43-44. The Memorandum stated that:

> [F]or more than two years, scalpers have been identified and restricted or banned from making further trades. Purchases from accounts with a history of frequent trades were rejected. Since August 2002, large transactions in the global, international and gold funds have been rejected without regard to the past history. While these procedures were in place they did not completely eliminate all timers.

Id. ¶ 44. In light of what Gabelli and Alpert knew and, indeed, had authorized in market timing by Headstart, this Memorandum, the complaint alleges, was materially misleading. *Id.* ¶ 45.

Finally, the complaint alleges that because of the secret nature of the defendants' wrongdoing, as well as the defendants' affirmative misrepresentations to GGGF's Board and shareholders, the SEC did not discover the fraud until late 2003. *Id.* ¶¶ 46-47.

On April 24, 2008, the SEC filed its complaint against the defendants, alleging in its First Claim that Alpert had violated the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, in its Second Claim that Alpert had violated the antifraud provisions of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), and in its Third Claim that both Alpert and Gabelli had aided and abetted violations by the Adviser of the antifraud provi-

sions of Sections 206(1) and 206(2) of the Advisers Act, 15 U.S.C. 80b-6(1) & (2). As relief for these violations, the SEC sought injunctions against future violations, disgorgement of ill-gotten gains, and civil monetary penalties.

On July 25, 2008, each of the defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. On March 17, 2010, the District Court granted the defendants' motions in substantial part. First, the District Court dismissed the Securities Act and Securities Exchange Act claims against Alpert, finding that Alpert's statement in the Memorandum that "for more than two years, scalpers have been identified and restricted or banned from making further trades" was "literally true" and that because "this statement was not a misrepresentation . . . Alpert had no duty to disclose fully Headstart's market-timing." *SEC v. Gabelli*, No. 08 Civ. 3868 (DAB), 2010 WL 1253603, at *8 (S.D.N.Y. Mar. 17, 2010). Second, while the District Court denied defendants' motion to dismiss the Advisers Act claim, it ruled that the SEC could not seek civil penalties for that claim because: (a) the SEC did not bring the claim within the statute of limitations period applicable to such penalties, and (b) the SEC is not authorized to seek monetary penalties for aiding and abetting violations of the Advisers Act. *Id.* at *4-5, 11-12. Third, the District Court dismissed the SEC's prayer for injunctive relief because the SEC "has not plausibly alleged that Defendants are reasonable likely to engage in future violations." *Id.* at

*11. Thus, the SEC's Advisers Act claim against the defendants survived the motions to dismiss, but the District Court barred all relief other than disgorgement.

Believing that disgorgement would not provide significant relief, the SEC moved to voluntarily dismiss the remaining claim without prejudice to the SEC's refiling this claim if, but only if, the SEC were successful in this appeal. The District Court granted the motion over the defendants' objections and entered judgment accordingly.

The SEC now appeals the District Court's dismissal of its Securities Act and Securities Exchange Act claims against Alpert and the District Court's rejection of the SEC's prayers for civil penalties and injunctive relief for the defendants' aiding and abetting violations of the Advisers Act. In addition to opposing the SEC's appeal, both defendants have cross-appealed, contending that the District Court erred in denying their motions to dismiss the SEC's prayer for disgorgement under the Advisers Act and, more generally, in denying their motions to dismiss with prejudice the SEC's claim for aiding and abetting violations of the Advisers Act.

DISCUSSION

A. Appellate Jurisdiction

We first address whether we have jurisdiction to hear the instant appeals. We generally lack jurisdiction over an "appeal from a dismissal of some of plaintiff's claims when the balance of the claims

have been dismissed without prejudice pursuant to a Rule 41(a) dismissal of the action," because permitting such an appeal would allow the parties to "effectively . . . secure[] an otherwise unavailable interlocutory appeal." *Chappelle v. Beacon Comm-c'ns Corp.*, 84 F.3d 652, 654 (2d Cir. 1996). However, in *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003), we recognized an exception to this rule where "a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court." *Id.* Under these circumstances, a judgment may be deemed "final," because the plaintiff "runs the risk that if his appeal is unsuccessful, his . . . case comes to an end." *Id.*

Given *Purdy*, it is clear that we have jurisdiction to consider the SEC's appeal, since the only dismissal that was without prejudice was expressly conditioned on the SEC's promise not to reassert this claim unless its appeal of this dismissal was successful on appeal. However, given the strong policy against interlocutory appeals, we see no reason to extend the narrow exception announced in *Purdy* to the defendants' cross-appeals. Nor do we think we should exercise pendent appellate jurisdiction over the cross-appeals. The doctrine of pendent appellate jurisdiction—which "allows us, where we have jurisdiction over an interlocutory appeal of one ruling, to exercise jurisdiction over other, otherwise unappealable interlocutory decisions," *see Myers v. Hertz Corp.*, 624 F.3d 537, 552 (2d Cir. 2010) (internal quotation marks omitted)—"should be exercised sparingly, if ever," *Bolmer v. Oliveira*, 594 F.3d 134, 141 (2d Cir. 2010) (internal

quotation marks omitted). Assuming the doctrine applies here at all, we see here none of the "exceptional circumstances," *Papineau v. Parmley*, 465 F.3d 46, 65 (2d Cir. 2006) (internal quotation marks omitted), that would warrant its invocation at this juncture. We therefore limit ourselves to the SEC's appeal.

B. Standard of Review

Turning to the merits of that appeal, we review the District Court's grant of the motions to dismiss *de novo*, "accept[ing] all well-pleaded allegations in the complaint as true [and] drawing all reasonable inferences in the plaintiff's favor." *Operating Local 649 Annual Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010). To survive a motion to dismiss, however, a complaint must "allege a plausible set of facts sufficient 'to raise a right to relief above the speculative level.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

C. The Securities Act and Securities Exchange Act Claims against Alpert

Applying these standards, we first consider whether the District Court erred in dismissing the Securities Act and Securities Exchange Act claims against Alpert that were premised on the theory that his statements in the Memorandum of 2003 were materially misleading. That Memorandum, as noted, stated that "for more than two years, scalpers have been identified and restricted or

banned from making further trades" but that the Adviser "did not completely eliminate all timers." The District Court was apparently of the view that because such statements were "literally true," they could not be misleading. *See Gabelli*, 2010 WL 1253603, at *8.

The law is well settled, however, that so-called "half-truths"—literally true statements that create a materially misleading impression—will support claims for securities fraud. *See List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir. 1965); *see also* Rule 10b-5, 17 C.F.R. § 240.10b-5. Here, the complaint plausibly alleges that a reasonable investor reading the Memorandum would conclude that the Adviser had attempted in good faith to reduce or eliminate GGGF market timing across the board, whereas, as Alpert well knew but failed to disclose, the Adviser had expressly agreed to let one major investor, Headstart, engage in a very large amount of GGGF market timing, in return for Headstart's investment in a separate hedge fund run by Gabelli. The District Court therefore erred in dismissing the Securities Act and Securities Exchange Act claims.

Alpert further argues, however, that even if the statements in the Memorandum were misleading, the District Court's determination can be affirmed on either of two alternate grounds: a failure to adequately allege materiality or a failure to adequately allege intent.

As to materiality, "a complaint may not properly be dismissed . . . on the ground that the alleged misstatements or omissions are not material

unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000) (internal quotation marks omitted). Here, the complaint alleges that, pursuant to an undisclosed agreement between the defendants and Headstart, the latter was permitted to engage in market time trading up to $20 million per transaction and completed 836 such transactions over a three year period. In total, Headstart allegedly traded $4.2 billion in GGGF, approximately 62 percent of the total value of all trading in the Fund during that period, and earned $9.7 million in profits while other GGGF investors, who were not only themselves precluded from such trading but also unaware of its being undertaken by Headstart, suffered annual losses of at least 24.1%. Compl. ¶¶ 21, 40.

Although the negative economic impact of these massive trades on GGGF's assets was less severe, *see* Compl. ¶ 2, it was still sufficient to create a jury issue as to its materiality. And, in any event, the notion that a reasonable investor would regard as immaterial the failure to disclose the secret arrangement by which the Fund and its Adviser, in return for a pay-off to another fund, allowed one GGGF investor to engage in highly profitable market timing while denying this opportunity to all other investors, borders on the frivolous.

As to intent, the complaint alleges that Alpert knew, or was reckless in not knowing, that the statements in the Memorandum were misleading,

because, *inter alia*, Alpert—the author of the Memorandum that reasonably gave the impression that the Adviser was making best efforts to eliminate scalping—had himself given the order to the market timing "police" to let Headstart continue its massive market timing, and because, as he also knew, Headstart was being given the preference in return for a secret pay-off in the form of an investment in Gabelli's hedge fund. Also, contrary to Alpert's contention that the complaint fails to allege that he knew market timing was harmful to the Fund, the complaint alleges that Alpert redeemed his own holdings in GGGF because, as he told a fellow Gabelli Funds officer, "Marc Gabelli was allowing the GGGF to be scalped." Compl. ¶ 42. Accordingly, we find that the complaint adequately states claims against Alpert for violations of Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act.

D. Civil Penalties

We next turn to whether the District Court erred in dismissing the prayer for civil penalties under the Advisers Act on the alternative grounds that (a) the SEC is not permitted to seek civil penalties in connection with a claim for aiding and abetting violations of the Advisers Act, and (b) the claim for civil penalties is time-barred. The first ground is plainly wrong, for this Court has previously held that civil penalties may be assessed in connection with such a claim. *See SEC v. DiBella*, 587 F.3d 553, 571-72 (2d Cir. 2009) (holding that because a

"'violation' of the Advisers Act" includes the aiding and abetting of principal violations of the Advisers Act, "the civil penalty provision encompasses both primary and secondary violators of the Advisers Act").

As for the alternative ground, the relevant statute of limitations is set forth in 28 U.S.C. § 2462, which provides that a claim for civil penalties must be brought within five years "from the date when the claim first *accrued*." 28 U.S.C. § 2462 (emphasis supplied). Because the complaint charges violations of the antifraud provisions of the Advisers Act,[3] the SEC argues that the claim did not "accrue" until September 2003 when, as the complaint alleges, the SEC first discovered the fraud. This, the SEC argues, is because the determination of accrual under § 2462 is subject to the fraud-based discovery rule—"a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it," or in the exercise of due diligence, should have discovered it, *see Merck & Co. v. Reynolds*, __ U.S. __, 130 S. Ct. 1784,1793-94 (2010). The defendants respond that since no reference to the discovery rule appears in the plain language of 28 U.S.C. § 2462, the SEC's claim for civil penalties accrued in August 2002, the last instance of Headstart's market timing in GGGF. In addition, defendant Gabelli argues that the discovery

[3] Specifically, the Third Claim alleges violations of Section 206(1) of the Advisers Act, which prohibits "any device, scheme, or artifice to defraud," and Section 206(2), which prohibits any practice that "operates as a fraud or deceit."

rule cannot save the SEC's claims against him because he did not take affirmative steps to conceal his misconduct.

As an initial matter, we note that Gabelli's latter argument reflects the all-too-common mistake by which the discovery rule is "sometimes confused with the concept of fraudulent concealment of a cause of action," *see Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002), and we take this opportunity to once again clarify that these two doctrines are distinct. Under the discovery rule, the statute of limitations for a particular claim does not accrue until that claim is discovered, or could have been discovered with reasonable diligence, by the plaintiff. As a general matter, this rule does not govern the accrual of most claims because most claims do not involve conduct that is inherently self-concealing. However, since fraud claims by their very nature involve self-concealing conduct, it has been long established that the discovery rule applies where, as here, a claim sounds in fraud. As the Supreme Court recently stated in *Merck*, "[t]his Court long ago recognized that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." 130 S. Ct. at 1793 (emphasis in original). *See also TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (the discovery rule is a "historical exception for suits based on fraud"). Thus, contrary to Gabelli's contention, the discovery rule applies to fraud claims "though there be no special circumstances or efforts on the

part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874). *See also* John P. Dawson, *Fraudulent Concealment and Statues of Limitation*, 31 MICH. L. REV. 875, 880 (May 1933) ("Where undiscovered 'fraud' was the basis of liability, it was universally agreed that no new concealment was necessary.").

The fraudulent concealment doctrine, by contrast, is an equitable tolling doctrine, not an accrual doctrine. Under the fraudulent concealment doctrine, even when a claim has already accrued, a plaintiff may benefit from equitable tolling in the event that the defendant took specific steps to conceal her activities from the plaintiff. Thus, whereas the discovery rule does not ordinarily apply to non-fraud claims (as it is generally expected that a plaintiff will be able to discover the conduct underlying non-fraud claims), the fraudulent concealment doctrine may be used to toll the limitations period for non-fraud claims where the plaintiff is able to establish that the defendant took affirmative steps beyond the allegedly wrongful activity itself to conceal her activity from the plaintiff.

In this case, since the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme, we hold that the discovery rule defines when the claim accrues and, correlatively, that the SEC need not plead that the defendants took affirmative steps to conceal their fraud. Although the defendants make much of the fact that Section 2462 does not expressly state a

discovery rule, this Court has previously held that for claims that sound in fraud a discovery rule is read into the relevant statute of limitation. *See Dabney v. Levy*, 191 F.2d 201, 205 (2d Cir. 1951) (Hand, J.) ("[I]n cases of 'fraud' . . . when Congress does not choose expressly to say the contrary, the period of limitation set by it only begins to run after the injured party has discovered, or has failed in reasonable diligence to discover, the wrong.") (internal quotations omitted). Indeed, the Supreme Court has recently affirmed that a fraud claim "accrues" only when the plaintiff discovers the fraud. *Merck*, 130 S. Ct. at 1793-94. Thus, while Congress might have to affirmatively include language about a discovery rule in the event that it wanted a discovery rule to govern the accrual of non-fraud claims or wanted to impose a limit on using a discovery rule for certain fraud claims, it would be unnecessary for Congress to expressly mention the discovery rule in the context of fraud claims, given the presumption that the discovery rule applies to these claims unless Congress directs otherwise.[4] *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (the discovery rule for claims of fraud "is read into *every federal statute of limitation*.") (emphasis added).

---

[4] The defendants' reliance on *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), is misplaced, since it did not involve fraud claims but concerned violations of the Toxic Substances Control Act. *Id.* at 1460-63. As the Seventh Circuit recently observed in *SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009), "[w]e need not decide when a 'claim accrues' for the purpose of § 2462 generally, because the nineteenth century recognized a special rule for fraud, a concealed wrong."

The defendants then argue that even if the discovery rule applies, the SEC's prayer for civil penalties must still fail because the SEC has not pled reasonable diligence. *Cf. SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009) (pursuant to discovery rule, "a victim of fraud has the full time from the date that the wrong came to light, or would have done had diligence been employed"). They claim that all of the evidence that GGGF was being harmed by market timing was publicly disclosed in periodic reports with the SEC and that, with reasonable diligence, the SEC's claims could have been discovered within Section 2462's five year limitations period. But the entire argument is, at best, premature. The "lapse of a limitations period is an affirmative defense that a defendant must plead and prove," *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 426 (2d Cir 2008), and dismissing claims on statute of limitations grounds at the complaint stage "is appropriate only if a complaint clearly shows the claim is out of time." *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999). Here, since the complaint expressly alleges that the SEC first discovered the facts of defendants' fraudulent scheme in late 2003, therefore, applying the discovery rule, the claim for civil penalties claims is not clearly time-barred.[5] Finding that at

[5] Indeed, the Seventh Circuit has observed that requiring the SEC to plead why it did not discover a fraud sooner would be "nonsensical" as it would require a plaintiff to "prove a negative" in the complaint. *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368 n.2 (7th Cir. 1997) (internal quotation marks omitted).

this stage in the litigation defendants have not met their burden of demonstrating that a reasonably diligent plaintiff would have discovered this fraud prior to September 2003, we conclude that the SEC's prayer for civil penalties survives defendants' motions to dismiss and must be reinstated.

E. Injunctive Relief

Finally, we turn to whether the District Court erred in dismissing the SEC's prayer for injunctive relief. In determining whether injunctive relief is appropriate, "[t]he critical question . . . is whether there is a reasonable likelihood that the wrong will be repeated." *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972). We first observe that where, as here, the complaint plausibly alleges that defendants intentionally violated the federal securities laws, it is most unusual to dismiss a prayer for injunctive relief at this preliminary stage of the litigation, since determining the likelihood of future violations is almost always a fact-specific inquiry.[6] Indeed, the defendants are unable to point to a single case where the SEC's prayer for injunctions against further violations was dismissed at the motion to dismiss stage based upon a finding of non-likelihood of further viola-

[6] For present purposes, we simply assume without deciding that a complaint must include sufficient factual allegations to plausibly allege not only a "claim to relief," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (construing Fed. R. Civ. P. 8(a) (2)), but also a "demand for the relief sought," Fed. R. Civ. P.8(a)(3)).

tions. In any event, since the complaint alleges that for almost three years Gabelli and Alpert intentionally aided and abetted Advisers Act violations and since "fraudulent past conduct gives rise to an inference of a reasonable expectation of continued violations," *see id.*, we conclude that the complaint sufficiently pleads a reasonable likelihood of future violations and thus reverse the District Court's dismissal of the SEC's prayer for injunctive relief.

CONCLUSION

For the foregoing reasons, we grant the SEC's appeal in all respects, dismiss the cross-appeals for want of appellate jurisdiction, and remand to the District Court for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of November, two thousand and eleven.

Before: Debra Ann Livingston,
Denny Chin,
Circuit Judges,
Jed S. Rakoff, *
District Judge.

Docket Nos. 10-3581(L)
10-3628(XAP)
10-3760 (XAP)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant-Cross-Appellee,

v.

MARC J. GABELLI, BRUCE ALPERT,

Defendants-Appellees-Cross-Appellants.

---

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

ORDER

IT IS HEREBY ORDERED that the motion by Appellees-Cross-Appellants to stay the mandate for 90 days pending the filing of a petition for writ of *certiorari* is GRANTED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ CATHERINE O'HAGAN WOLFE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: March 17, 2010
08 Cv. 3868 (DAB)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

MARC J. GABELLI, and, BRUCE ALPERT,

Defendants.

MEMORANDUM AND ORDER

DEBORAH A. BATTS, United States District Judge.

Plaintiff Securities and Exchange Commission (hereinafter "SEC") brings suit against Defendant Bruce Alpert for violations of Section 10(b) of the Exchange Act, Rule 10b-5, and Section 17(a) of the Securities Act. Plaintiff also brings suit against Defendants Alpert and Marc J. Gabelli for Aiding and Abetting Violations of Sections 206(1) and 206(2) of the Investment Advisers Act. Each Defendant now moves to dismiss the Complaint for failure to state a claim under Rule 12(b)(6). For the following reasons, Defendants' Motions are GRANTED in part, and DENIED in part.

I. BACKGROUND

Defendant Marc J. Gabelli ("Gabelli") is a resident of Connecticut and was portfolio manager for the Gabelli Global Growth Fund (hereinafter "GGGF") from 1997 until early 2004, as well as several affiliated hedge funds. (Compl. ¶10.) The GGGF was advised by third party Gabelli Funds, LLC ("Gabelli Funds"), a New York limited liability company and investment adviser within the meaning of Section 2(a)(20) of the Investment Company Act and Section 202(a)(11) of the Investment Advisers Act. (Compl. ¶12.) Defendant Bruce Alpert ("Alpert") is a resident of New York and has been Chief Operating Officer of Gabelli Funds since 1988. (Compl. ¶11.) Third-party Najy N. Nasser, who was the Chief Investment Adviser for Headstart Advisers, Ltd. ("Headstart"),[1] became acquainted with Mr. Gabelli during the Summer of 1999. (Compl. ¶¶1, 2, 20.)

Beginning in September 1999, Gabelli permitted Headstart to "market-time" the GGGF. Market-timing is a form of short-term trading that exploits the fact that mutual funds are generally priced only once per day, at 4:00 PM, in order to earn a profit at times when public information is disclosed and has not yet been incorporated into that price. (Compl. ¶¶15-17.) One type of market-timing, known as "time-zone arbitrage" is premised on the fact that many mutual funds include shares of international stocks. Market-timers can take

---

[1] Headstart has also operated under the name Folkes Asset Management (Compl. ¶1.)

advantage of the fact that price movements during the "New York trading day" may cause corresponding movements in foreign markets once they open, and thus lead to increases in the price of foreign securities that are part of the mutual fund. However, market-timers know that these increases in foreign security prices will not be incorporated into the mutual fund's price until the following day, enabling them to purchase the fund at an artificially low price and then sell it at a profit the following day when the mutual fund's price is finally adjusted. (Compl. ¶17.)

The Prospectus for GGGF reserved the right to "reject any purchase order if, in the opinion of the Fund management, it is in the Fund['s] best interest to do so" and this language was often used in letters sent to brokers whose customers were suspected of market-timing the fund. (Compl. ¶¶31, 34.) The letters also explained that "[m]arket timing can negatively affect the mutual fund investment process. Excessive and unpredictable trading hinders a fund manager's ability to pursue the fund's long-term goals." (Compl. ¶34.) Gabelli Funds would also occasionally reject individual purchases or ban particular accounts from trading in their funds if those purchases or accounts were suspected of engaging in market-timing. (Compl. ¶31.)

Headstart initially conducted its market-timing activities with GGGF utilizing $5,000,000.00 disbursed between two separate accounts. (Compl. ¶20.) The account information was communicated to a Gabelli Funds employee, who in turn notified Defendant Gabelli. At some point after Headstart

began market-timing, but before April 2000, Alpert communicated to Nasser that Headstart would not be allowed to trade in any fund advised by Gabelli Funds, other than GGGF. (Compl. ¶20.) On April 7, 2000, Gabelli allowed Headstart to increase the amount that it was market-timing to $20,000,000.00, in consideration of a $1,000,000.00 investment that Headstart promised to make in a hedge fund that Gabelli managed. (Compl. ¶21.) Headstart notified Gabelli that it had opened up a new account with GGGF to allow for this additional market-timing capacity. (Compl. ¶21.)

On April 17, 2000, Nasser sent an email to Gabelli, pertaining to the increase in market-timing capacity, in which he stated that he was ". . . looking forward to doing something on [Gabelli's] Hedge Fund especially in the spirit of cooperation which I think we have and are developing. I understand inflows would have a greater value for you businesswise now, near the beginning." (Compl. ¶22.) On April 18, 2000, Nasser again emailed Gabelli, advising him that he planned on confirming the $1,000,000.00 investment in Gabelli's hedge fund on April 24, 2000. (Compl. ¶23). Nasser eventually confirmed that this investment had been made on April 25, 2000. (Compl.¶23.)

On December 15, 2000, Alpert, in an internal memo, stated that "Market Timers (scalpers) have been using the International and Global Funds in a way that is disruptive to the Fund and the management of the portfolio. We are making efforts to identify each account and restrict them from purchasing the funds." (Compl. ¶31.) In addition, Alpert had two Gabelli Fund employees, known

internally as "market-time police," review certain fund purchases and reject those that appeared to be attempts at market-timing. (Compl. ¶31.) These employees were instructed to ignore the Headstart accounts because they were related to "a Marc Gabelli-client relationship." (Compl. ¶33.) At least one of the employees was given these instructions directly from Alpert. (Compl. ¶33.)

Additionally, in December 2000, Gabelli contacted the Chief Financial Officer of the Gabelli Funds to order that a suspected market-timer be banned from trading in GGGF. (Compl. ¶32.) The communication also expressed that any market-timing activity in GGGF would be "only what [he] authorized". (Compl. ¶32.)

On February 21, 2001, Alpert made comments at a GGGF board meeting, at which Gabelli was in attendance and also spoke, regarding the harm that "market-timing" or "scalping" was causing, as well as the specific actions that Gabelli Funds was taking to reduce market-timing activities in the fund. (Compl. ¶36; Sherman Decl., Ex. D). These comments were similar in substance to the December 15, 2000 internal memorandum. (Compl. ¶36.)

On or about April 1, 2002, Alpert advised Headstart to reduce the amount of market-timing in GGGF because the high trading levels were in violation of federal securities laws. (Compl. ¶25.) Gabelli subsequently sent an email to Alpert stating, "WHAT IS THE SITUATION WITH MARKET TIMER – I UNDERSTAND YOU TOLD HIM 'I SAID' IT WAS OK . . . VERY PAROCHIAL AND DESTRUCTIVE." (Compl. ¶25.) (emphasis and ellipsis in original). Albert responded, "I have always

been opposed to the market timers in the fund. I had a discussion with Najy Nassar that he should reduce his market timing activity to no more than 3% of the fund. He was reluctant to do this except he reduced one account to 3% and still is using about 10% or $16 million. I would like him out completely. However, if he continues his participation in other products of the firm we should allow some monies to remain in the Mutual funds." (Compl. ¶25.)

Thereafter, Headstart reduced the amount of money that it had invested in the hedge fund that Gabelli managed. (Compl. ¶26.) In an email, Gabelli stated that the investment was drawn down because Headstart "was reduced in [market] timing money in mutual funds." (Compl. ¶26.) Prior to August 31, 2002, at least 48 accounts were banned from trading in GGGF and at least $23,000,000.00 in purchases were rejected due to suspected market-timing. (Compl. ¶35.)

On August 7, 2002, the Chief Executive Officer of Gabelli Funds' parent company instructed that all market-timers playing the "international game" should be stopped. (Compl. ¶28.) Alpert then informed Headstart that it would no longer be permitted to market-time GGGF, and Headstart subsequently redeemed the rest of its investment in Gabelli's hedge fund. (Compl. ¶28.)

On September 3, 2003, the New York Attorney General announced an investigation into market-timing. (Compl. ¶43.) In response, Alpert posted a September 3, 2003 Memorandum to the Gabelli Funds' parent company's website, stating that, "for more than two years, scalpers have been identified

and restricted or banned from making further trades. Purchases from accounts with a history of frequent trades were rejected. Since August 2002, large transactions in the global, international and gold funds have been rejected without regard to the past history. While these procedures were in place they did not completely eliminate all timers." (Compl. ¶44; Sherman Declaration, Ex. E.)

On May 4, 2007 Alpert, by his attorney, entered into a tolling agreement with the SEC, which was amended on September 14, 2007, extending the statute of limitations in this matter for approximately seven months. (Sherman Decl., Ex. G.) The Complaint in this matter was filed on April 24, 2008.

II. DISCUSSION

A. Legal Standard for a Motion to Dismiss

For a complaint to survive dismissal under Rule 12(b)(6), the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility," the Supreme Court has explained,

> "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a com-

> plaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556-57). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted). "In keeping with these principles," the Supreme Court has stated:

> "a court considering a motion to dismiss can choose to begin by identifying pleadings, that because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Iqbal, 129 S.Ct. at 1950.

In ruling on a 12 (b)(6) motion, a court may consider the complaint as well as "any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference." *Zdenek Marek v. Old Navy (Apparel) Inc.*, 348 F.Supp. 2d 275, 279 (S.D.N.Y. 2004) (citing

Yak v. Bank Brussels Lambert, 252 F.3d 127, 130 (2d Cir. 2001) (internal quotations omitted)).

Under Rule 9(b), "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Pro. 9(b). To satisfy the particularity requirement of Rule 9(b), a complaint must "specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *United States Fire Ins. Co. v. United Limousine Service, Inc.*, 303 F.Supp.2d 432 (S.D.N.Y. 2004) (citing *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989)).

B. Statute of Limitations

1. The Applicable Limitations Period

While "[a]n action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it," *SEC v. Tandem Management Inc.*, 2001 WL 1488218, * (S.D.N.Y. Nov. 21, 2001) (quoting *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)), 28 U.S.C. § 2462 "is a general statute of limitations, applicable . . . to the entire federal government in all *civil penalty cases*, unless Congress specifically provides otherwise." *3M Co. (Minnesota Min. and Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (emphasis added).

Section 2462 provides that "an action, suit or proceedings for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall

not be entertained unless commenced within five years from the date when the claim first accrued. Therefore, to the extent the Commission's claims are subject to a statute of limitations, the catch-all limitations period in 28 U.S.C. § 2462 applies." *S.E.C. v. Jones*, 476 F.Supp.2d 374, 380 (S.D.N.Y. 2007). However, courts have found that in light of "the ordinary meaning of 'penalty,' and the clear language of § 2462 . . . the limitations period in § 2462 applies to civil penalties and equitable relief that seeks to punish, but does not apply to equitable relief which seeks to remedy a past wrong or protect the public from future harm." *Id.* at 380-81 (citing *Johnson v. SEC*, 87 F.3d 484, 486-92 (D.C. Cir. 1996); *SEC v. Tandem Mgmt. Inc.*, 2001 WL 1488218, at *6 (S.D.N.Y. Nov. 21, 2001)). In particular, "Section 2462's statute of limitations applies to the SEC's request for civil penalties but not to its request for permanent injunctive relief [or] disgorgement." *SEC v. Kelly*, 663 F.Supp.2d 276, 287 (S.D.N.Y. 2009); *see also Johnson*, 87 F.3d at 491 (§ 2462 does not apply to the remedy of disgorgement).

Accordingly, to the extent the SEC seeks to enjoin Defendants Alpert and Gabelli from violating or aiding and abetting the violation of the securities laws, or an order directing Defendants to disgorge profits, (Compl. ¶59(A)-(C)), in order to remedy an alleged past wrong and protect the public from future harm, the five-year statute of limitations of § 2462 does not apply. Nevertheless, the SEC also seeks an Order directing Defendants to pay civil monetary penalties, (Compl. ¶59(D)),

which is clearly subject to § 2462 under the language of the statute.

Plaintiff contends that a claim accrues and the statute of limitations begins to run for purposes of § 2462, when the fraud or misstatement is discovered. The "discovery rule," when applicable, provides that a cause of action accrues when the violation was discovered or should have been discovered by Plaintiff, rather than when the violation occurs. *See, e.g., S.E.C. v. Alexander*, 248 F.R.D. 108, 116 (E.D.N.Y. 2007). Although the Second Circuit has not addressed the issue, other courts both within and outside this jurisdiction have found that the discovery rule does not apply to § 2462. *See, e.g., 3M Co. v. Browner*, 17 F.3d 1453, 1463 (D.C. Cir. 1994) (rejecting the discovery rule as "unworkable; outside the language of the statute; [and] inconsistent with judicial interpretations of § 2462"); *Alexander*, 248 F.R.D. at 116 (collecting cases holding that a "claim for penalties subject to Section 2462 accrues at the time the violation giving rise to the penalties occurs"); *S.E.C. v. Jones*, 2006 WL 1084276, *6 (S.D.N.Y. Apr. 25, 2006) (finding the analysis in *Browner* instructive and rejecting the applicability of the discovery rule to claims subject to § 2462). This Court agrees and finds that the discovery rule does not apply to claims subject to the limitations of § 2462.

2. Application of the Limitations Period to the Alleged Violations.

Here, the Exchange Act claims are based upon Alpert's September 3, 2003 Memorandum and an alleged "scheme to defraud" through the hiding of

Headstart's market timing from the GGGF Board. (Compl. ¶44; Plt's Mem. of Law, 11-13.) Because the April 24, 2008 Complaint in this matter was filed within five years of September 2, 2003, Plaintiff's request for civil penalties under § 2462 for the alleged September 3, 2003 misrepresentation and omission is not barred, although for the reasons explained, *infra*, those claims are dismissed because Plaintiff cannot plead all the necessary elements of a cause of action. As to Alpert's December 15, 2000 memorandum stating that market-timers were being identified and restricted, (Compl. ¶31), his December 2000 instructions to "market-time police" employees to leave Headstart alone, (Compl. ¶¶31-33), and his February 21, 2001 report to the GGGF Board that market-timing was being restricted, (Compl. ¶¶36-38), the April 24, 2008 Complaint was filed well more than five years and seven months after these alleged violations.

For the Aiding and Abetting claims under Sections 206(1) and 206(2) of the Investment Advisers Act, the Complaint alleges that Headstart's market timing ended on August 7, 2002. (Compl. ¶44.) Accordingly, for Defendant Alpert, the statute of limitations on a claim for civil penalties under the Investment Advisers Act had run by March 7, 2008, five years and seven months after the violation occurred, and prior to the filing of the Complaint on April 23, 2008. Similarly, for Defendant Gabelli, the statute of limitations on the Investment Advisers Act claims ran on August 7, 2007, well before the Complaint was filed.

Accordingly, the statute of limitations has run on Plaintiff's claims for civil penalties under the

Investment Adviser Act and the alleged scheme to defraud under the Exchange Act.

3. Fraudulent Concealment

Plaintiff also contends, however, that the statute of limitations was tolled by Defendants' alleged fraudulent concealment, which courts in this jurisdiction have found to apply to claims subject to § 2462. *See S.E.C. v. Power*, 525 F.Supp.2d 415, 424-35 (S.D.N.Y. 2007); *S.E.C. v. Jones*, 2006 WL 1084276, *6 (S.D.N.Y. Apr. 25, 2006).

To invoke the fraudulent concealment doctrine, a Plaintiff must allege: "(1) that the defendants concealed the cause of action; (2) that the plaintiff did not discover the cause of action until some point within five years of commencing the action; and (3) that the plaintiff's continuing ignorance was not attributable to lack of diligence on its part." *Power*, 525 F.Supp.2d at 424 (citing *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988)). "Plaintiff can establish the concealment element by pleading either that the Defendants took affirmative steps to prevent discovery of the fraud or that the wrong itself was . . . self-concealing." *Power*, 525 F.Supp.2d 415 (quoting *Jones*, 2006 WL 1084276, at *6).

The doctrine of fraudulent concealment does not apply "where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying cause of action." *Abercrombie v. Andrews College*, 438 F.Supp.2d 243, (S.D.N.Y. 2006). Further, "[s]tanding alone, allegations of fraud are generally insufficient to demonstrate that a particular act is

self-concealing. Indeed, for a fraud to be self-concealing, the defendant must have engaged in some misleading, deceptive or otherwise contrived action or scheme, *in the course of committing the wrong*, that was designed to mask the cause of action." *SEC v. Jones*, 476 F.Supp.2d 374, 382 (S.D.N.Y. 2007) (emphasis in original) (quoting *Hobson v. Wilson*, 737 F.2d 1, 34 (D.C. Cir. 1984)).

Here, Plaintiff pleads that it "could not have discovered that wrongdoing earlier because Defendants took affirmative acts to conceal it, and because of the self-concealing nature of Defendants' wrongdoing." (Compl. ¶46.) Here, Plaintiff does not allege with particularity under Rule 9(b) what acts Defendants took, *beyond the alleged acts of wrongdoing themselves*, or what contrivance or scheme was designed to mask the SEC's causes of action. Nor does Plaintiff meet the third element of fraudulent concealment by alleging how it has engaged in due diligence during the time that the statute of limitations was running.

Accordingly, because the statute of limitations has run on Plaintiff's claims for civil penalties under the Investment Adviser Act and the alleged scheme to defraud under the Exchange Act, these claims are DISMISSED.

C. Section 10(b) & Rule 10b-5 and 17(a) Claims Against Defendant Alpert

To state a cause of action under Section 10(b) and Rule 10b-5, a Plaintiff must allege "(1) material misstatement or omission, (2) scienter, (3) a connection with the purchase or sale of a security, (4) reliance . . . , (5) economic loss, and (6) loss cau-

sation, i.e., a causal connection between the material misrepresentation and the loss." *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 478 n.1 (2d Cir. 2008) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005)).

To allege a claim under Sections 17(a)(1), (2), and (3), Plaintiff "must show that the defendant: (1) committed a deceptive or manipulative act, or made a material misrepresentation (or a material omission if the defendant had a duty to speak) or used a fraudulent device; (2) with scienter; (3) which affected the market for securities or was otherwise in connection with their offer, sale or purchase." *SEC v. Power*, 525 F.Supp.2d 415, 419 (S.D.N.Y. 2007) (citing *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999)). However, "[w]hile proof of scienter is a necessary element of liability under . . . § 17(a)(1) and . . . § 10(b) and Rule 10b-5, it is not required for liability under § 17(a)(2) & (3)." *Id.* (citing *Aaron v. SEC*, 446 U.S. 680, 697 (1980)).

Here, Plaintiff alleges that Alpert violated Section 10(b)(5), Rule 10b-5 and Section 17(a) by both misstating and omitting material facts in his September 2003 memorandum and by engaging in a scheme to defraud, which consisted of authorizing Headstart to market-time GGGF in exchange for an investment in Gabelli's hedge fund while hiding these facts from GGGF's Board of Directors. (Compl. ¶¶ 36, 38, 44-45, 49-50, 52-53; Plt's Mem. of Law, 11-14.) In response, Defendant Alpert argues that the SEC's Complaint does not allege with sufficient particularity that Alpert made a misrepresentation or actionable omission, that any such

misrepresentation or omission was material, that Alpert engaged in a scheme to defraud, or that Alpert acted with the requisite scienter. (Alpert's Mem. of Law, 12-20.)

Plaintiff alleges that Alpert made a misstatement in his September 2003 memorandum to the Gabelli Fund's parent's website, stating that "for more than two years, scalpers have been identified and restricted or banned from making further trades." (Compl. ¶¶ 43-45.) The Court finds that this statement was literally true, given that for more than two years, scalpers had been identified and restricted from making further trades. (Compl. ¶¶ 30-31, 33-35.)

Further, Plaintiff's sole basis for its material omission claim is Alpert's alleged duty to correct the statement that "for more than two years, scalpers have been identified and restricted or banned from making further trades." (Compl. ¶¶ 43-45.) However, as the Court has found, this statement was not a misrepresentation, and thus Alpert had no duty to disclose fully Headstart's market-timing in the September 3, 2003 memorandum.

Plaintiff also fails to allege that Alpert participated in a fraudulent scheme or artifice. To "participate in a fraudulent scheme" a Defendant must do more than "perform[] purely administrative duties without knowledge of the purpose of the scheme" but must "take . . . concrete steps in furtherance of the violation" by engaging in "actions or statements that were independently deceptive or fraudulent." *SEC v. Collins & Aikman Corp.*, 524 F.Supp.2d 477, 486 (S.D.N.Y. 2007).

Under the securities laws, however, a "market timing agreement . . . standing alone, [can] not be considered *per se* a fraudulent device intended to defraud investors." *SEC v. PIMCO Advisors Fund Management LLC*, 341 F.Supp.2d 454, 468 (S.D.N.Y. 2004). Further" while "[a]rguably . . . [such an] agreement, in which [an investor] received favorable treatment in exchange for its placement of long-term investments in various . . . Funds, violated . . . fiduciary duties towards investors, . . . such potential violations do not by themselves result in violations of Rule 10b-5." *Id.*, 469. Here because Defendant Alpert permitted Headstart to engage in a practice that was not fraudulent, and did not mislead investors, Plaintiff has not adequately alleged a fraudulent scheme or device intended to defraud investors.

Accordingly, because Plaintiff has not pled with particularity a material misrepresentation, omission, or fraudulent scheme or artifice, Defendant Alpert's Motion to Dismiss the Section 10(b), Rule 10b-5 and 17(a) claims is GRANTED.

D. Section 206 Aiding and Abetting Claim Against Defendants Alpert and Gabelli

To state a cause of action for aiding abetting liability under Sections 206(1) and 206(2) of the Investment Advisers Act, Plaintiff must allege (1) an underlying violation of the act; (2) Defendant's knowledge of the fraudulent acts; and (3) Defendant's provision of substantial assistance to the primary violation. *See SEC v. Cedric Kushner Promotions, Inc.*, 417 F.Supp.2d 326, 334 (S.D.N.Y. 2006); *SEC v. Pimco Advisors Fund Management*

LLC, 341 F.Supp.2d 454, 470 (S.D.N.Y. 2004). The elements of a primary violation of Section 206(1) and (2) "have been interpreted as substantively indistinguishable from Section 17(a) of the Securities Act, except that Section 206(1) requires proof of fraudulent intent, while Section 206(2) simply requires proof of negligence by the primary wrongdoer." *Pimco Advisors Fund Management LLC*, 341 F.Supp.2d at 470 (citing *SEC v. Moran*, 922 F.Supp. 867, 896-97 (S.D.N.Y. 1996)).

"As [the Second Circuit] and the Supreme Court have noted, the Advisers Act reflects . . . congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested." *SEC v. DiBella*, 587 F.3d 553, 567 (2d Cir. 2009) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S 180, 186 (1963)). To that end, Section 206 has been found to "establish federal fiduciary standards to govern the conduct of investment advisers . . . requiring advisers to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." *SEC v. Treadway*, 430 F.Supp. at 293, 338 (S.D.N.Y. 2006) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 44 U.S. 11, 17 (1979); *Moran*, 922 F.Supp. at 895-96)).

Here, the alleged primary violator is Gabelli Funds, LLC, which Defendants do not contest meets the definition of an Investment Adviser to the GGGF Fund under the Investment Advisers Act. Plaintiff has adequately alleged that Gabelli Funds knowingly entered into an agreement with

Headstart permitting it to market-time GGGF in exchange for investment in an affiliated hedge fund, (Compl. ¶¶20-24), at the same time that Gabelli Funds had acknowledged that market-timing was harmful to long-term investors in the GGGF, (Compl. ¶¶31, 34). Taking these facts as true, Plaintiff has alleged with particularity a violation of Gabelli Funds' fiduciary duty to its investors under both Section 206(1) and (2).

Further, Plaintiff adequately pleads that Defendant Gabelli knew or was reckless in not knowing of Gabelli Funds' violation of the Investment Advisers Act, and provided substantial assistance to that violation. In particular, Plaintiff alleges that Gabelli himself entered into the market-timing agreement with Headstart, permitted Headstart to increase its market-timing trading, made clear that no one would be permitted to market-time GGGF unless he authorized it, was informed by Alpert of Headstart's continued market-timing in GGGF, and was present at Alpert's allegedly misleading presentation to the Board of the GGGF. (Compl. ¶¶20-23, 25-26, 32, 36-37.) Similarly, Plaintiff has pled with particularity that Alpert knew of and provided substantial assistance to Gabelli Funds' violation, including by providing the "ground rules" for market-timing to Headstart, directing "market-time police" employees not to monitor Headstart's trades because they were related to Gabelli's client relationship, and omitting the existence of Headstart's market-timing while representing to the Board of Directors of GGGF that management was taking steps to

restrict market-timing. (Compl. ¶¶20, 31, 36, 43-45.)

Accordingly, Defendants' Motions to Dismiss the Aiding and Abetting claims under Sections 206(1) and (2) of the Investment Adviser Act are DENIED.

E. Available Remedies

Defendants further argue that, separate and apart from their statute of limitations arguments, the remedies of disgorgement, injunctive relief, and civil monetary penalties are unavailable to the SEC as a matter of law.

1. Injunctive Relief

First, Defendants contend that injunctive relief is unavailable because the SEC has not adequately pled scienter or "demonstrated any realistic likelihood of recurrence." (Alpert Mem. of Law, 24; Gabelli Mem. of Law, 15.) As the Court found, *supra*, the SEC has adequately alleged the element of scienter for each of its claims. In determining whether injunctive relief is available in an action under the Exchange Act, "[t]he focus of this inquiry is on the defendant's past conduct." *SEC v. Colonial Investment Management, LLC*, 2008 WL 2191764, *3 (S.D.N.Y. 2008) (quoting *SEC v. Commonwealth Chem. Sec., Ins.*, 574 F.2d 90, 99 (2d Cir. 1978)). "Other factors courts should consider in determining whether there is a reasonable likelihood of future violations include: (1) the egregiousness of the past violations; (2) the degree of scienter; (3) the isolated or repeated nature of the violations; (4) whether defendant has accepted

blame for his conduct; and (5) whether the nature of the defendant's occupation makes it likely he will have opportunities to commit future violations." *Id.* (citing *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998)).

Although the SEC has pled that "unless restrained and enjoined" Defendants "will continue to violate" Sections 206(1) and (2) of the securities laws, (Compl. ¶ 57), its allegations do not plausibly allege a reasonable likelihood that the Defendants will engage in future violations. There is no allegation that either Defendant has ever engaged in a breach of fiduciary duty or other fraudulent activity either prior or subsequent to the specific claims brought here. Further, Plaintiff does not allege how Defendants' acts are particularly egregious, and even concedes that any market-timing was not, by itself, fraudulent or illegal. (Plt's Mem. Of Law, 9.) Further, the Court notes that when the Defendants were instructed by their parent company to stop all market-timing, the Defendants ended Headstart's market-timing in August of 2002 and the Attorney General began his investigation into market-timing in September of 2003. (Compl. ¶¶ 28, 45.)

Additionally, the Court finds the facts alleged here to be quite different from those where other Courts have denied motions to dismiss injunctive relief under the securities laws. *See, e.g., SEC v. Colonial Investment Management LLC*, 2008 WL 2191764, *3 (S.D.N.Y. May 23, 2008) (denying Motion to Dismiss where it was alleged that "defendants repeatedly [on eighteen separate occasions] and knowingly engaged in conduct that violated

[securities laws] over a period of several years, and engaged in sham transactions to conceal the violative conduct.); *SEC v. Power*, 525 F.Supp.2d 415, (S.D.N.Y. 2007) (denying Motion to Dismiss where it was alleged that defendant "engaged in repeated fraudulent conduct . . . and knowing misconduct over a period of several years" including the creation of sham transactions, improperly writing off assets, improperly valuing inventory, falsely increasing a company's performance through the improper consolidation of revenues, and improperly directing the establishment of reserves on a worst-case basis).

Accordingly, the Court finds that Plaintiff has not plausibly alleged that Defendants are reasonably likely to engage in future violations under the Investment Advisors Act, and that the Defendants' motion for dismissal of Plaintiff's request for an injunction is GRANTED.

2. Disgorgement

Second, Defendants contend that disgorgement is unavailable because the SEC has failed to allege that it is necessary to deter future wrongdoing or that Defendants were unjustly enriched, (Alpert Mem. of Law, 24), and because Gabelli Funds has already paid disgorgement, (Gabelli Mem. of Law, 14.) "In a securities enforcement action, as in other contexts, disgorgement is not available primarily to compensate victims" but "[i]nstead . . . to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud." *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). Thus, the fact that

Gabelli Funds has already disgorged profits does not prevent the SEC from seeking disgorgement from Alpert and Gabelli for purposes of preventing any unjust enrichment accruing to them and for deterrence. The SEC adequately alleges that the remedy of disgorgement is necessary to prevent Defendants from enriching themselves through their "ill-gotten gains from their illegal conduct . . ." (Compl. ¶ 59(c)).

3. Civil Penalties

Finally, Defendants contend that the SEC cannot seek civil monetary penalties from aiders and abettors under the Investment Advisers Act. (Gabelli Mem. of Law, 15.) Although the Court has found that Plaintiff may not seek civil penalties for its Investment Advisers Act claims under the statute of limitations, in the alternative, the Court also agrees that the Investment Advisers Act does not provide for civil penalties for aiders and abettors. Section 209(e) of the Investment Advisers Act provides that:

> Whenever it shall appear to the Commission that any person has violated any provision of [the Act] . . . the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person *who committed such a violation.*

15 U.S.C. § 80b-9(e)(1) (emphasis added).

Where the "statutory language is unambiguous, in the absence of a clearly expressed legislative intent

to the contrary, that language must ordinarily be regarded as conclusive." *Reves v. Ernset & Younq*, 507 U.S. 170, 177 (1993). Here, the statutory language is unambiguous that civil penalties in judicial proceedings may be imposed only upon a "person who committed" a violation of the Investment Advisers Act.

Further, "[w]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S*, 464 U.S. 16, 23 (2000). Here, Section 209(e) of the Investment Advisers Act as it now exists was amended by Section 402 of the Securities Enforcement Remedies and Penny Stock Act of 1990 (the "Remedies Act"), Pub. L. No. 101-429, 104 Stat. 931, 949-51. (*See* Gabelli Mem. of Law, 16 n.17). An additional provision of the Remedies Act – Section 401 – provides that in *administrative proceedings*, "the Commission may impose a civil penalty if it finds . . . that such person . . . has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person." 15 U.S.C. § 80b-3(I). Consequently, it is apparent that had Congress wished to provide for civil monetary penalties for aiders and abetters in judicial proceedings under the Investment Advisers Act, it would have done so through the use of similar language as it used to provide for such penalties in administrative proceedings under the Act.

Further, Plaintiffs's argument for why the Court should disregard both the ordinary meaning of the

statutory language of Section 209(e) and the express provision of civil penalties for aiders and abetters under Section 401 of the Remedies Act is not based upon a "clearly expressed legislative intent to the contrary," *Reves v. Ernset & Young*, 507 U.S. at 177. Instead, the SEC relies upon the legislative history of the entirely distinct Exchange Act to argue by analogy that the term "violation" as used in Section 209(e) of the Investment Advisers Act should be interpreted as including both primary and aiding and abetting violations.

As the Court in *SEC v. Bolla*, 550 F.Supp.2d 54, (D.D.C. 2008) stated, the "SEC's argument fails, however, because . . . [it] does not discuss the Advisers Act at all, and thus does not directly bear upon Congress' view of the SEC's ability to seek monetary penalties against aiders and abetters in enforcement actions under the Advisers Act." *Id.*, 61.

The Court agrees with the Court in *Bolla*, which found that because "the SEC offers no convincing rationale for ignoring the Supreme Court's instructions and the canons of statutory construction . . . Section 209(e) does not authorize the SEC to seek, or grant this Court jurisdiction to impose, monetary penalties upon Defendant . . . for his aiding and abetting of the Advisers Act." *Id.*, 62-63.

Accordingly, Defendants' Motions to Dismiss the request for disgorgement is DENIED, while Defendants' Motions to Dismiss the request for an injunction, and for civil penalties under the Investment Advisers Act is GRANTED.

III. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss the Complaint are GRANTED in part, and DENIED in part. Plaintiff's claims under Section 10(b) and Rule 10b-5, as well as Section 17 of the Exchange Act are DISMISSED, with prejudice. Plaintiff's requests for an injunction and for civil monetary penalties under the Investment Advisers Act are DISMISSED, with prejudice. Defendants shall Answer the remaining claim for disgorgement under the Investment Advisers Act within 30 days of the date of this Order.

SO ORDERED.

DATED: New York, New York
March 17, 2010

/s/ DEBORAH A. BATTS
Deborah A. Batts
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of November, two thousand eleven,

---

Docket Nos. 10-3581 (Lead)
10-3628 (XAP)
10-3760 (XAP)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant-Cross-Appellee,

v.

MARC J. GABELLI, BRUCE ALPERT,

Defendants-Appellees-Cross-Appellants.

ORDER

Appellee-Cross-Appellant Marc J. Gabelli filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. By letter filed on October 14, 2011, Appellee-Cross-Appellant Bruce Alpert joined in the petition. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the

Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ CATHERINE O'HAGAN WOLFE

OPPOSITION BRIEF

No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARK D. CAHN
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

HOPE HALL AUGUSTINI
DOMINICK V. FREDA
Senior Litigation Counsels
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether the court of appeals correctly held that the five-year limitations period in 28 U.S.C. 2462 did not begin to run until the Securities and Exchange Commission discovered, or reasonably could have discovered, petitioners' alleged fraudulent scheme.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 23

TABLE OF AUTHORITIES

Cases:

3M Co. v. *Browner*, 17 F.3d 1453 (D.C. Cir. 1994) 19
Bailey v. *Glover*, 88 U.S. (21 Wall.) 342 (1875) ... 8, 9, 14, 16
Bay Area Laundry & Dry Cleaning Pension Trust Fund v. *Ferbar Corp. of Cal.*, 522 U.S. 192 (1997) 8, 19
Cada v. *Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991) 13
Credit Suisse Securities (USA) LLC v. *Simmonds*, 132 S. Ct. 1414 (2012) 20, 21, 22
Dabney v. *Levy*, 191 F.2d 201 (2d Cir.), cert. denied, 342 U.S. 887 (1951) 14
Exploration Co. v. *United States*, 247 U.S. 435 (1918) 8, 9, 10, 14
FEC v. *Williams*, 104 F.3d 237 (9th Cir. 1996), cert. denied, 522 U.S. 1015 (1997) 19
Glus v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) 8
Holland v. *Florida*, 130 S. Ct. 2549 (2010) 13
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 8, 9, 13, 14
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 10, 13

Cases—Continued: Page

Janus Capital Group, Inc. v. *First Derivative Traders*, 131 S. Ct. 2296 (2011) 3, 4
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 13
Koller v. *United States*, 359 U.S. 309 (1959) 20
Merck & Co., Inc. v. *Reynolds*, 130 S. Ct. 1784 (2010) 6, 8, 9, 12, 19
Prevost v. *Gratz*, 19 U.S. (6 Wheat.) 481 (1821) 17
Riddell v. *Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989) 15
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 2
SEC v. *Cuban*, 620 F.3d 551 (5th Cir. 2010) 17
SEC v. *Koenig*, 557 F.3d 736 (7th Cir. 2009) 10, 11, 12, 14, 18, 19
SEC v. *Tambone*:
550 F.3d 106 (1st Cir. 2008) 18
573 F.3d 54 (1st Cir. 2009) 18
597 F.3d 436 (1st Cir. 2010) 18
Schindler Elevator Corp. v. *United States ex rel. Kirk*, 131 S. Ct. 1885 (2011) 3
Sherwood v. *Sutton*, 21 F. Cas. 1303 (C.C.N.H. 1828) ... 12
Solomon v. *United States*, 276 F.2d 669 (6th Cir.), cert. denied, 346 U.S. 890 (1960) 20
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 10, 14
Texas v. *Allan Constr. Co.*, 851 F.2d 1526 (5th Cir. 1988) 15, 16

Cases—Continued: Page

United States v. *Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985) 19
United States v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954) 19, 20

Statutes:

Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.* 19
Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* 2
15 U.S.C. 80b-6(1) 2
15 U.S.C. 80b-6(2) 2
15 U.S.C. 80b-9(d) 3
15 U.S.C. 80b-9(e)(2)(A) 17
Securities Exchange Act of 1934, 15 U.S.C. 78a:
15 U.S.C. 78p(a) (§ 16(a)) 22
15 U.S.C. 78p(b) (§ 16(b)) 20, 21
Surplus Property Act of 1944, 40 U.S.C. 123 20
Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.* 19
28 U.S.C. 1658(b) 9
28 U.S.C. 2462 ..... *passim*

Miscellaneous:

John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875 (1933) 16

Miscellaneous—Continued: Page

Staff Report to the SEC, *Exemptive Rule Amendments of 2004: The Independent Chair Condition* (Apr. 2005), http://www.sec.gov/news/studies/indchair.pdf 5

In the Supreme Court of the United States

No. 11-1274

MARC J. GABELLI AND BRUCE ALPERT, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 653 F.3d 49. The opinion of the district court (Pet. App. 26a-51a) is not reported but is available at 2010 WL 1253603.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2011. A petition for rehearing was denied on November 22, 2011 (Pet. App. 52a-53a). On February 10, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 22, 2012. On March 7, 2012, Justice Ginsburg further extended the time to April 20, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Investment Advisers Act of 1940 (Act), 15 U.S.C. 80b-1 *et seq.*, "was the last in a series of Acts designed to eliminate certain abuses in the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963); see *id.* at 186-187 (noting that the Act is part of a comprehensive statutory scheme enacted by Congress to assure that "the highest ethical standards prevail in every facet of the securities industry") (internal quotation marks omitted). The Act "reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship." *Id.* at 191 (internal quotation marks omitted). In Congress's view, an investment adviser has "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients." *Id.* at 194 (internal quotation marks omitted). The Act is therefore designed "to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." *Id.* at 191-192.

To that end, the Act makes it unlawful for any adviser to "employ any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. 80b-6(1). The Act also prohibits an adviser from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. 80b-6(2). The "fundamental purpose" of those provisions is to ensure that investment advisers give "full disclosure" to their clients regarding the management of their investments. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 186. The Securities and Exchange Commission (SEC or Commis-

sion) may bring a civil enforcement action against investment advisers, or persons associated with them, who violate any of the provisions of the Act or who aid and abet such violations. 15 U.S.C. 80b-9(d).

2. a. This case concerns a type of "market timing" of mutual funds known as "time-zone arbitrage."[1] As a general rule, mutual funds are priced once a day, usually at 4 p.m. Eastern Time when the New York Stock Exchange closes. That price, called the fund's net asset value (NAV), reflects the closing prices of the securities held by the fund. If one of those securities is traded on an overseas market, however, the closing price incorporated into the fund's NAV can be based on stale information. For instance, if a United States mutual fund holds stock in a Japanese company that is traded on the Tokyo Stock Exchange (TSE)—which closes at 2 a.m. Eastern Time—the fund's NAV for each day incorporates the stock's Japanese closing price from 14 hours earlier. Positive market movements during the New York trading day, which will later cause the TSE price to rise when the TSE opens at 8 p.m. Eastern Time, will not be reflected in the fund's late-afternoon NAV. See 1:08-cv-3868, Doc. No. 1, at 6-9 (S.D.N.Y. Apr. 24, 2008) (Complaint).

"Market timers" attempt to exploit that type of pricing inefficiency by buying or selling a mutual fund's shares based on events that they do not expect to be reflected in the fund's NAV. Market timers then reverse their positions for a profit the next day. See *Ja-*

---

[1] This case arises on petitioners' motion to dismiss the Commission's complaint. See Pet. App. 51a. The factual statements in this brief are drawn from that complaint and are taken as true at this stage of the proceedings. See, *e.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.2 (2011).

nus Capital Group, Inc. v. *First Derivative Traders*, 131 S. Ct. 2296, 2300 n.1 (2011) ("[A] market-timing investor could buy shares of a mutual fund at the artificially low NAV and sell the next day when the NAV corrects itself upward."). That practice harms long-term mutual fund shareholders by capturing an arbitrage profit that comes dollar-for-dollar out of other shareholders' pockets. See *id.* at 2300 (observing that market timing "harms other investors in the mutual fund"). Market timing thus dilutes the value of mutual fund shares held by other investors. See Complaint 7-8.

b. Gabelli Funds LLC (Gabelli Funds) is an investment adviser, within the meaning of the Act, to a mutual fund called Gabelli Global Growth Fund (GGGF). See Pet. 6; Complaint 5. During the relevant period, petitioner Bruce Alpert was the Chief Operating Officer of Gabelli Funds and was responsible for, *inter alia*, monitoring trading in GGGF to eliminate market timing. *Id.* at 5, 11. Petitioner Marc Gabelli was the portfolio manager for GGGF and also managed other affiliated funds. *Id.* at 4-5.

In April 2008, the Commission brought a civil enforcement action against petitioners. The SEC alleged that petitioners had violated the Act by permitting one of GGGF's investors—Headstart Advisers, Ltd. (Headstart)—to market time the mutual fund, in return for Headstart's investment in one of the other funds managed by Gabelli. Complaint 1-2, 8-12. The Commission alleged that petitioners had failed to disclose Headstart's market timing (or their quid pro quo agreement with the market timer) to GGGF's board of directors and other investors. The Commission further alleged that petitioners had falsely represented that they were tak-

ing all necessary steps to eliminate market timing. *Id.* at 2-3, 13, 15.[2]

3. The district court granted in part and denied in part petitioners' motion to dismiss the complaint. Pet. App. 26a-51a. As relevant here, the court held that most of the Commission's claims for civil penalties were time-barred. *Id.* at 34a-39a. The court relied on 28 U.S.C. 2462, which provides in pertinent part that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." The court held that the SEC's claims against petitioners had accrued when petitioners committed their various fraudulent acts, not when the Commission discovered or reasonably could have discovered petitioners' fraud. Pet. App. 37a. Because most of petitioners' fraudulent acts had occurred more than five years before the Commission filed its complaint in April 2008, the court concluded that the SEC was foreclosed from seeking civil penalties for the bulk of its claims. *Id.* at 37a-38a.

---

[2] In a 2005 report to Congress, Commission staff described "egregious industry scandals" that were uncovered after the New York Attorney General announced an investigation into market timing in mutual funds in September 2003. See *Exemptive Rule Amendments of 2004: The Independent Chair Condition* 31 (Apr. 2005), http://www.sec.gov/news/studies/indchair.pdf. The report explained that fund managers in some of the largest mutual fund complexes had allowed certain investors to market time funds "in return for assets invested in other funds managed by the adviser." *Ibid.* The report concluded that, "[b]y placing their own interests in generating fees for themselves and their affiliated entities above those of the fund shareholders, and by failing to disclose these arrangements and resulting conflicts of interest to fund boards and shareholders, fund managers breached their fiduciary duties to shareholders." *Id.* at 33.

4. The court of appeals reversed. Pet. App. 1a-23a. As relevant here, the court noted that the Commission had brought its claims under "the antifraud provisions" of the Advisers Act and had alleged that petitioners "aided and abetted Gabelli Funds' fraudulent scheme." *Id.* at 19a. The court held that, because the Commission's claims sound in fraud, they are subject to the "discovery rule." *Id.* at 18a. That rule prevents an applicable limitations period from running in a fraud case until the fraud claim "is discovered, or could have been discovered with reasonable diligence, by the plaintiff." *Ibid.*; see *Merck & Co., Inc.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010).

The court of appeals rejected petitioners' argument that the discovery rule should not be applied because the Commission had failed to plead any affirmative acts by petitioners to conceal their fraud. Pet. App. 19a-20a. That argument, the court stated, conflates the discovery rule with the doctrine of fraudulent concealment, which prevents a limitations period from running when a defendant has taken steps to conceal his allegedly wrongful conduct. *Ibid.* Petitioners also contended that, "even if the discovery rule applies" to this case, the civil-penalty claims were time-barred because the SEC could have discovered the relevant facts earlier if it had exercised reasonable diligence. *Id.* at 21a. The court rejected that argument as "premature" at the motion-to-dismiss stage of the case, explaining that expiration of the limitations period is an affirmative defense and that the burden is therefore on petitioners to plead and prove the Commission's lack of reasonable diligence. *Ibid.* The court of appeals concluded that, because "the complaint expressly alleges that the [Commission] first discovered the facts of [petitioners'] fraudulent scheme in

late 2003," less than five years before the complaint was filed in April 2008, the Commission's "civil penalties claims [are] not clearly time-barred." *Ibid.*

ARGUMENT

The court of appeals correctly held that, because the Commission's penalty claims in this case are based on petitioners' fraud, the limitations period in 28 U.S.C. 2462 did not begin to run until the Commission discovered, or reasonably could have discovered, petitioners' unlawful scheme. That decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Section 2462 of Title 28 provides that an action for the enforcement of any civil penalty "shall not be entertained unless commenced within five years from the date when the claim first accrued." Petitioners contend (Pet. 11) that the Commission's claims against them for civil penalties "first accrued" when petitioners engaged in the fraudulent scheme at issue, regardless of the time at which the Commission discovered (or reasonably could have discovered) that scheme. This case, however, does not provide the Court a suitable opportunity to determine when, as a general matter, a claim "first accrue[s]" for purposes of Section 2462. Whatever the proper test for determining the accrual date for other sorts of claims, the Commission's claims here are for fraud. This Court has repeatedly recognized that, unless Congress specifies a different rule, the limitations period in a suit for fraud does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying his claim.

That rule derives from the equitable maxim that a party should not be permitted to benefit from its own misconduct. See, *e.g.*, *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-233 (1959) ("[W]e need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.") (footnote omitted). This Court has long held as a matter of equity that a defendant cannot use his own misconduct as a defense, including by unfairly relying on a statute of limitations. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); *Exploration Co.* v. *United States*, 247 U.S. 435, 445-446 (1918); *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348-349 (1875).

"[I]n the statute of limitations context, the word 'discovery' is often used as a term of art in connection with the 'discovery rule,' a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010). That doctrine "arose in fraud cases as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action.'" *Ibid.* (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). That exception reflects the Court's longstanding "recogni[tion] that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Ibid.* When (as in Section 2462) a particular statute makes the "accru[al]" of a claim the event that triggers the limitations period, the *Merck* Court's description of the dis-

covery rule indicates that a fraud claim does not "accrue" until the plaintiff has (actually or constructively) discovered the relevant facts.[3]

The discovery rule also applies more broadly to delay the commencement of the applicable limitations period in cases involving fraud or concealment, even when the relevant statute specifies some event other than the accrual of the claim as the point at which the limitations period commences. "[T]his Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Holmberg*, 327 U.S. at 397 (quoting *Bailey*, 88 U.S. (21 Wall.) at 348). The Court in *Holmberg* explained that "[t]his equitable doctrine is read into every federal statute of limitation." *Ibid.*; see *Exploration Co.*, 247 U.S. at 449 ("When Congress passed the [limitations period] in question the rule of *Bailey* v. *Glover* was the established doctrine of this court. [The statute] was presumably enacted with the ruling of that case in mind.").

Thus, even if Section 2462 required that suit be commenced within five years after the defendant's wrongful

---

[3] As petitioners correctly explain (Pet. 24-25), this case differs from *Merck* in that the statute at issue in *Merck* (28 U.S.C. 1658(b)) contained an express discovery rule. In construing Section 1658(b), however, the Court relied heavily on the background principles that generally govern the application of limitations provisions to fraud claims. See 130 S. Ct. at 1793-1796. The Court's discussion of those background rules is directly relevant here.

act, the discovery rule would delay the running of the limitations period in a fraud case until the relevant information was discovered or could have been discovered by a reasonably diligent plaintiff. See *Exploration Co.*, 247 U.S. at 445, 449 (applying discovery rule where pertinent limitations period ran from "the date of the issuance of [certain] patents"). The Court has sometimes referred to this rule as one of tolling. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001) (*TRW*) (explaining that "equity tolls the statute of limitations in cases of fraud or concealment"); *id.* at 37 (Scalia, J., concurring in the judgment); cf. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (identifying, as one circumstance where "equitable tolling" of limitations periods has been approved, the situation "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). The timeliness of the Commission's complaint in this case does not depend, however, on whether the discovery rule is used to determine when the Commission's claims "accrued" or instead is treated as a ground for tolling the applicable limitations period.

The Seventh Circuit made precisely that point in a similar fraud case brought by the Commission for civil penalties. See *SEC* v. *Koenig*, 557 F.3d 736 (2009). The court explained that it did not need to decide "when a 'claim accrues' for purpose of [Section] 2462 generally, because the nineteenth century recognized a special rule for fraud, a concealed wrong." *Id.* at 739. That doctrine, the court noted, "is apt to be called equitable tolling." *Ibid.* The court observed, however, that it is "unimportant in practice" "[w]hether a court says that a claim for fraud accrues only on its discovery (more precisely, when it *could have been* discovered by a person exercis-

ing reasonable diligence) or instead says that the claim accrues with the wrong, but that the statute of limitations is tolled until the fraud's discovery." *Ibid.* "Either way," the court explained, "a victim of fraud has the full time from the date that the wrong came to light, or would have done had diligence been employed." *Ibid.* In *Koenig*, as in this case, the Commission brought its enforcement action within five years after it was able to discover the fraud at issue. The Seventh Circuit therefore concluded that the Commission's enforcement action was timely. *Id.* at 739-740.

Like the Seventh Circuit in *Koenig*, the court of appeals correctly applied the discovery rule in this case. The Commission's claims against petitioners under the Advisers Act are based on fraud. The Commission has alleged that petitioners permitted a single investor in a mutual fund that they managed (GGGF) to market time the fund in exchange for a quid pro quo investment in another Gabelli-managed fund. Petitioners did not disclose the market timing and their resulting conflict of interest, and they falsely informed the GGGF's board and other investors that they were taking all necessary steps to eliminate market timing. See pp. 4-5, *supra*. The court of appeals therefore held that, because "the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme, the discovery rule defines when the claim accrues." Pet. App. 19a.

The court below thus treated the discovery rule as a means of identifying a fraud claim's accrual date, rather than as a ground for tolling Section 2462's five-year limitations period. As the Seventh Circuit recognized in *Koenig*, however, that terminological choice is "unim-

portant in practice." 557 F.3d at 739; cf. *Sherwood* v. *Sutton*, 21 F. Cas. 1303, 1305 (C.C.N.H. 1828) (Story, J.) (noting the existence of "some diversity of judgment" as to whether the discovery rule was "an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud"). Either way, the Commission was required to bring its suit within five years after it discovered, or with reasonable diligence could have discovered, petitioners' fraudulent scheme. Applying that rule to the facts of this case, the court of appeals correctly held that the Commission's complaint was not subject to dismissal on limitations grounds. Pet. App. 21a-22a.

2. Petitioners advance several arguments why the limitations period in 28 U.S.C. 2462 should have commenced to run before the Commission discovered, or reasonably could have discovered, petitioners' fraudulent scheme. None withstands scrutiny.

a. Petitioners argue (Pet. 19-21) that applying a discovery rule is inconsistent with the text of Section 2462, which imposes a five-year time limit without establishing any express exception for cases involving fraud or concealment. Whether described as a doctrine of accrual or tolling, however, the discovery rule has long been understood as a background principle that presumptively governs the application of federal limitations statutes unless Congress specifies otherwise. Its applicability does not depend on express language incorporating the discovery rule into Section 2462.

Thus, while the date of the defendant's wrongdoing will often be the accrual date for purposes of that statute, the Court in *Merck* described the discovery rule in fraud cases as "a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it." 130

S. Ct. at 1793. The Court likewise has repeatedly held that statutes of limitations are generally "subject to rules of forfeiture and waiver" and "typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008); see *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (explaining that federal statutes of limitations are "normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling") (quoting *Irwin*, 498 U.S. at 95-96). That Section 2462 does not explicitly incorporate the discovery rule does not render inapplicable the background principles that govern the interpretation of federal limitations periods in cases of fraud or concealment. See pp. 8-9 & n.3, *supra*.[4]

The court of appeals therefore correctly reasoned "that for claims that sound in fraud a discovery rule is read into the relevant statute of limitation." Pet. App. 20a. This Court and other courts have long said the same thing. See, *e.g.*, *Holmberg*, 327 U.S. at 397 ("This equitable doctrine is read into every federal statute of limitation."); *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) ("[T]he 'discovery rule' of federal common law * * * is read into statutes of limitations in federal-question cases * * * in the absence of a con-

[4] Section 2462's five-year deadline for filing suit likewise contains no express exception for cases in which the defendant fails to assert its limitations defense in a timely manner. The absence of such an express exception, however, does not cast doubt on the inference that Section 2462's deadline (like statutes of limitations generally) "is subject to rules of forfeiture and waiver." *John R. Sand*, 552 U.S. at 133. Similarly with respect to the discovery rule, the crucial question is not whether Section 2462 explicitly authorizes that equitable doctrine, but whether Congress has clearly displaced the usual rule that the doctrine applies in cases of fraud or concealment.

trary directive from Congress."), cert. denied, 501 U.S. 1261 (1991); *Dabney* v. *Levy*, 191 F.2d 201, 205 (2d Cir.) (Hand, J.) ("[I]n cases of fraud, * * * when Congress does not choose expressly to say the contrary, the period of limitation set by it only begins to run after the injured party has discovered, or has failed in reasonable diligence to discover[,] the wrong.") (internal quotation marks omitted), cert. denied, 342 U.S. 887 (1951). Indeed, this Court applied the discovery rule in *Holmberg*, *Exploration Co.*, and *Bailey*, although none of the limitations statutes at issue in those cases contained express language regarding the plaintiff's discovery of his cause of action. See *Holmberg*, 327 U.S. at 397; *Exploration Co.*, 247 U.S. at 449; *Bailey*, 88 U.S. (21 Wall.) at 347.

Nor does it matter, as petitioners argue (Pet. 32-33), that the Commission is the plaintiff in this fraud case and is seeking civil penalties. This Court has made clear that the discovery rule applies in cases involving fraud or concealment (without deciding whether the rule also applies in other contexts). See *TRW*, 534 U.S. at 27. The Court has further explained that there is "no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the Government as well as a private individual." *Exploration Co.*, 247 U.S. at 449; see *Koenig*, 557 F.3d at 739 ("[T]he United States is entitled to the benefit of [the discovery] rule even when it sues to enforce laws that protect the citizenry from fraud, but is not itself a victim.") (citing *Exploration Co.*). The court of appeals therefore correctly held that the discovery rule applies to the time limit in Section 2462 in this case, just as it would apply to other

statutes of limitations in other cases involving fraud or concealment.

b. Petitioners contend (Pet. 23-24, 30-31) that the discovery rule does not extend the limitations period in this case because they did not take affirmative steps to conceal their fraud. That contention, the court of appeals recognized, conflates two distinct (though related) justifications for extending an applicable limitations period. One justification is that the fraudulent nature of a defendant's offense prevents a plaintiff from knowing that she has been defrauded. Another is that the defendant has misrepresented or concealed facts that are essential to a plaintiff's cause of action, whether or not that cause of action sounds in fraud. See, *e.g.*, *Riddell* v. *Riddell Washington Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989) (distinguishing between "wrongs as to which concealment is established by the nature of the act, and wrongs as to which additional acts of concealment are required to trigger the tolling requirement") (internal quotation marks omitted); *Texas* v. *Allan Constr. Co.*, 851 F.2d 1526, 1529 (5th Cir. 1988) ("[The fraudulent concealment] doctrine, which is applicable to any cause of action, should not be confused with the doctrine applicable where the gist of the action itself is fraud, and the concealment is inherent in the fraud.") (internal quotation marks omitted; brackets in original; capitalization added). In either case, an applicable limitations period does not begin to run until the plaintiff is aware, or could have been aware through reasonable diligence, of the facts underlying her cause of action.

This Court has long recognized that *either* of those circumstances justifies deferring the commencement of a limitations period for so long as the plaintiff is reasonably unaware of the facts underlying his claim. In

Bailey, the Court observed that "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud." 88 U.S. (21 Wall.) at 347-348. The Court further explained, however, that "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, *though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.*" *Id.* at 348 (emphasis added). Thus, although the Court recognized a distinction between "concealing a fraud" and "committing a fraud in a manner that it concealed itself," *id.* at 349, it made clear that the discovery rule applies in both circumstances. Because application of the discovery rule in this case depends on the fraudulent nature of petitioners' violation, it does not require that petitioners have taken additional affirmative steps to conceal their fraud.[5]

c. Petitioners argue (Pet. 28-30) that the decision below creates the potential for limitless tolling in cases

---

[5] See Pet. App. 18a ("[S]ince fraud claims by their very nature involve self-concealing conduct, it has been long established that the discovery rule applies where, as here, a claim sounds in fraud."); see also *Allan Constr. Co.*, 851 F.2d at 1529 ("[I]n a fraud case, the plaintiff need only aver the underlying fraud in order to toll the statute of limitations until such time as the plaintiff had some notice of the wrong; fraud is, by its very nature, self-concealing."). John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 880-883 (1933) ("Where undiscovered 'fraud' was the basis of liability, it was universally agreed that no new concealment was necessary and the wrongdoer might remain wholly passive, provided no avenues were open to the plaintiff for discovery of the fraud.").

where the government alleges fraudulent violations of the securities laws. Petitioners' concerns, however, are neither novel nor peculiar to securities cases. Courts long ago recognized that, despite concerns about stale evidence and the passage of time, the discovery rule was necessary to ensure that a defendant could not benefit from his own fraud or concealment. See, *e.g.*, *Prevost* v. *Gratz*, 19 U.S. (6 Wheat.) 481, 498 (1821) (observing that although the "length of time necessarily obscures all human evidence," it is likewise true that "the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a Court of equity to grant ample and decisive relief").

Under the traditional discovery rule, moreover, the limitations period in a fraud case begins to run when a reasonably diligent plaintiff *could have* discovered the relevant facts, even if the actual plaintiff did not discover them until later. And to bring an enforcement action like this one, the Commission must satisfy not only Section 2462's timing requirement, but also the pleading standards for fraud, which may become more difficult to meet as the defendant's conduct becomes more remote in time. See, *e.g.*, *SEC* v. *Cuban*, 620 F.3d 551, 552-553 & n.4 (5th Cir. 2010) (discussing those standards). If an enforcement action is allowed to go forward and the Commission prevails on the merits, the district court has discretion to set the amount of any civil penalty, and it can consider the passage of time as well as other relevant factors. See, *e.g.*, 15 U.S.C. 80b-9(e)(2)(A) (providing that the "amount of the penalty shall be determined by the court in light of the facts and circumstances"). Taken together, the relevant stat-

utory provisions create ample incentives for the Commission to pursue its claims diligently.

3. Contrary to petitioners' contention (Pet. 13-19), the decision below does not conflict with any decision of another court of appeals. Like the Second Circuit in this case, the other two courts of appeals (the First and Seventh Circuits) to consider the question presented here have held that, in fraud cases brought by the Commission seeking civil penalties, Section 2462's five-year limitations period does not begin to run until the Commission knew or should have known the relevant facts. See *Koenig*, 557 F.3d at 739-740; *SEC* v. *Tambone*, 550 F.3d 106, 148-149 (1st Cir. 2008).[6] Petitioners suggest that in *Koenig* "the [Commission] made sufficient allegations of the defendant's concealing conduct to permit the [Commission] to go forward with its penalty claim." Pet. 18. But the defendant's fraud in *Koenig* was no more or less "conceal[ed]" than in this case. In *Koenig*, a corporate executive used various accounting methods to overstate the company's profits. See 557 F.3d at 737-739. The executive falsely told outside accountants that he would discontinue using those methods, see *id.* at 740, but that is not different from petitioners' false representation to directors and investors that they were attempting to eliminate market timing. In any event, nothing in the

---

[6] The First Circuit granted en banc review in *Tambone* and accordingly withdrew the panel opinion, but the en banc court limited its review to a different issue in the case. See *SEC* v. *Tambone*, 573 F.3d 54 (1st Cir. 2009). The en banc court's subsequent opinion was confined to that issue, and the court expressly reinstated the panel's conclusion that an enforcement action by the Commission is timely if brought within five years of when the Commission discovered, or reasonably could have discovered, a defendant's fraud. See *SEC* v. *Tambone*, 597 F.3d 436, 450 (1st Cir. 2010).

Seventh Circuit's decision rested on the fact that the defendant there misled outside accountants.

Petitioners argue (Pet. 13-18) that four other courts of appeals have held that a claim "accrue[s]" for purposes of Section 2462 at the time of the underlying violation. In three of those cases, however, the underlying violation had nothing to do with fraud. See *FEC* v. *Williams*, 104 F.3d 237, 241 (9th Cir. 1996) (defendant exceeded campaign contribution limits but did not fail to disclose the violations), cert. denied, 522 U.S. 1015 (1997); *3M Co.* v. *Browner*, 17 F.3d 1453, 1460-1463 (D.C. Cir. 1994) (defendant imported chemicals in violation of the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*); *United States* v. *Core Labs., Inc.*, 759 F.2d 480, 481 (5th Cir. 1985) (defendant violated the antiboycott provisions of the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*). Those cases thus stand for the unremarkable proposition that a cause of action often accrues at the time of a defendant's unlawful conduct. See Pet. App. 20a n.4 (noting that petitioners' reliance on *3M Co.* is "misplaced" because that case "did not involve fraud claims"); *Koenig*, 557 F.3d at 739 (distinguishing *3M Co.* on the same ground). Cf. *Merck*, 130 S. Ct. at 1793 (explaining that the discovery rule "delays accrual of a cause of action until the plaintiff has 'discovered' it," and that "[t]he rule arose in fraud cases as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action'") (quoting *Bay Area Laundry*, 522 U.S. at 201).

In the fourth case on which petitioners rely, *United States* v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954), the government alleged that the defendant had fraudulently procured surplus property from the War Assets Admin-

istration. *Id.* at 860. The question in *Witherspoon*, however, was whether the government's action was for civil penalties and thus whether Section 2462 applied at all. The government brought its action under the Surplus Property Act of 1944, 40 U.S.C. 123, which provides that a defendant who fraudulently procures federal property is liable for $2000 per fraudulent act (in addition to double damages and costs). See *Witherspoon*, 211 F.2d at 860. The government argued that its suit was for damages rather than civil penalties within the meaning of Section 2462, but the court of appeals rejected that contention. *Ibid.* The court did not address the discovery rule, however, let alone hold that the rule does not extend Section 2462's five-year window in cases involving fraud or concealment. And in any event, *Witherspoon* was overruled by *Koller* v. *United States*, 359 U.S. 309 (1959), which held that a suit under the Surplus Property Act of 1944 is not one for civil penalties subject to Section 2462's limitations period. See *Solomon* v. *United States*, 276 F.2d 669, 672-673 (6th Cir.), cert. denied, 364 U.S. 890 (1960).

4. Petitioners contend (Pet. 25-27) that the Court should grant their petition, vacate the judgment below, and remand the case for reconsideration in light of *Credit Suisse Securities (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012). Nothing in *Simmonds*, however, casts doubt on the correctness of the decision below.

In *Simmonds*, this Court considered the limitations period for filing suit against a corporate insider to recover short-swing profits under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b). "Section 16(b) provides that suits must be brought within 'two years after the date such profit was realized.'" 132 S. Ct. at 1417 (quoting 15 U.S.C. 78p(b)). The Court

"divided 4 to 4" on the question whether that two-year period could be tolled at all. *Id.* at 1421. It held that, "assuming some form of tolling does apply, it is preferable to apply that form which Congress was certainly aware of," *ibid.*, rather than a more expansive tolling rule that was "completely divorced from long-settled equitable-tolling principles," *id.* at 1419.

In particular, the Court in *Simmonds* rejected the plaintiff's contention that Section 16(b)'s limitations period should be tolled until the corporate insider filed the disclosure statement required by Section 16(a) of the Securities Exchange Act. See 132 S. Ct. at 1419. The Court found it "well established * * * that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff." *Id.* at 1420. Accordingly, the Court concluded, "[a]llowing tolling to continue beyond the point at which a [Section] 16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be inequitable and inconsistent with the general purpose of statutes of limitations." *Ibid.* (emphasis omitted).

Petitioners' reliance on *Simmonds* is misplaced. Even with respect to Section 16(b), the Court in *Simmonds* did not hold that tolling was impermissible. Rather, the Court was evenly divided on that question, and held only that any tolling could not extend beyond the time when a reasonably diligent plaintiff would have discovered the relevant facts. The *Simmonds* Court's stated reason for rejecting the expansive tolling rule proffered by the plaintiff in that case is also inapposite here. In *Simmonds*, the plaintiff's proposed approach was novel because it divorced equitable-tolling principles from the reason why equity would delay the limita-

tions period in the first place: the plaintiff's reasonable lack of awareness of the facts underlying her claim. Here, by contrast, the court of appeals applied the discovery rule in its traditional form, holding that Section 2462's limitations period would begin to run when the SEC knew, or with reasonable diligence could have known, of petitioners' fraudulent scheme. See Pet. App. 18a-21a.

Finally, contrary to petitioners' contention (Pet. 27), the Court in *Simmonds* did not suggest "that the doctrine of fraudulent concealment [is] the only appropriate basis for avoiding a statutory limitations period where Congress ha[s] not specified otherwise." The Court in *Simmonds* discussed fraudulent concealment as a possible ground for tolling because that was the tolling principle potentially applicable to the case. The plaintiff's claim for recovery of short-swing profits did not sound in fraud; rather, the plaintiff argued that the defendants' failure to file the statement required by Section 16(a) of the Securities Exchange Act should be viewed as a form of fraudulent concealment. See 132 S. Ct. at 1419 (explaining that the expansive tolling rule advocated by the plaintiff was unsound "[e]ven accepting that equitable tolling for fraudulent concealment is triggered by the failure to file a [Section] 16(a) statement"). This Court had no occasion to address the application of the discovery rule to cases where the underlying violation is based upon fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARK D. CAHN
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

HOPE HALL AUGUSTINI
DOMINICK V. FREDA
Senior Litigation Counsels
Securities and Exchange Commission

JULY 2012

REPLY BRIEF

No. 11-1274

IN THE

Supreme Court of the United States

MARC J. GABELLI and BRUCE ALPERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
212-698-3500

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000
lliman@cgsh.com

Counsel for Petitioners

August 14, 2012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

Cases

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 2, 5

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 8

Bailey v. Glover,
88 U.S. 342 (1874)..... 9

Cada v. Baxter Healthcare Corp.,
920 F.2d 446 (7th Cir. 1990)..... 5, 6

Cottage Sav. Ass'n v. Comm'r of Internal Revenue,
499 U.S. 554, 562 (1991)..... 7, 8

Exploration Co. v. United States,
247 U.S. 435, 435 (1918)..... 8, 9

FEC v. Williams,
104 F.3d 237 (9th Cir. 1996)..... 2

Glus v. Brooklyn E. Dist. Terminal,
359 U.S. 232 (1959)..... 10

Holland v. Florida,
130 S. Ct. 2549 (2010)..... 10

Holmberg v. Armbrecht,
327 U.S. 392 (1946)..... 10

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990)..... 10

Page(s)

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 10

SEC v. Bartek,
No. 11-10594, slip op.
(5th Cir. Aug. 7, 2012) 1-4, 7, 9

SEC v. Koenig,
557 F.3d 736 (7th Cir. 2009) 2

SEC v. Tambone,
550 F.3d 106 (1st Cir. 2008) 2

Sherwood v. Sutton,
21 F. Cas. 1303 (C.C.N.H. 1828) 10

Trawinski v. United Techs.,
313 F.3d 1295 (11th Cir. 2002) 2

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 6, 7

United States v. Core Labs., Inc.,
759 F.2d 480 (5th Cir. 1985) 2

United States v. Maillard,
26 F. Cas. 1140 (S.D.N.Y. 1871) 8

United States v. Witherspoon,
211 F.2d 858 (6th Cir. 1954) 2

Rules and Statutes

17 C.F.R. § 240.10b-5 4

15 U.S.C. § 77q 4

15 U.S.C. § 78j(b) 4

Page(s)

15 U.S.C. § 78n 4

15 U.S.C. § 78u-2(b) 11

15 U.S.C. § 80b-9(e)(2)(A) 11

28 U.S.C. § 1658(b) 7

28 U.S.C. § 2462 ..... *passim*

Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322 7

Other Authorities

In re Retention of Records Relevant to Audits and Reviews, Release No. 33-8180, 2003 WL 164273 (SEC Jan. 24, 2003) 6

Mark T. Roche, Sean C. Adams, & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, BNA Securities Regulation & Law Report, July 23, 2012, *available at* 2012 WL 2949120 5

PETITIONERS' REPLY BRIEF

The Government's opposition hinges on two assertions that have been undermined by a decision the Fifth Circuit issued after the Government filed its brief: that there is no circuit split and that the distinction between discovery accrual and equitable tolling is always "unimportant." The holding below creates a circuit split on an important and recurring federal question: whether a claim accrues under Section 2462 when it arises or when the Government discovers, or should have discovered, it. Under the Second Circuit's holding, a defendant whom the Government can allege violated an antifraud statute will forever be at peril of a governmental penalty, so long as the Government claims it discovered the claim recently and did not know of it earlier. In the history of the statute, no appellate court has ever previously read such a discovery rule into Section 2462.

1. The Government argues that there is no circuit split because the four appellate courts that have held that Section 2462 did not incorporate discovery did not do so in the context of an antifraud statute and the fifth appellate court that held that the statute for a fraud penalty claim begins to run when the violation takes place did not explicitly consider discovery. Opp. 18-20. In its recent decision, *SEC v. Bartek*, No. 11-10594, slip op. at 2 (5th Cir. Aug. 7, 2012), however, the Fifth Circuit explicitly rejected those distinctions. It held

that Section 2462's "first accrued" language refers to the date of violation and that the discovery rule did not apply even when the Government alleged the defendant violated an antifraud statute. *Bartek*, slip op. at 5-7; *see also id.* at 10 n.7 ("[W]e have rejected an automatic application of a fraud discovery rule into a federal statute when the statute is 'explicit in commanding' at what moment a suit must be brought.") (citation omitted). In so doing, it relied on *Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994); and *United States v. Core Labs., Inc.*, 759 F.2d 480, 483 (5th Cir. 1985), each of which it concluded had "similarly held that § 2462 does not incorporate a discovery rule." *Bartek*, slip op. at 6. Moreover, although the Fifth Circuit did not rely on it, *United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954), is also inconsistent with the decision below: that case *held* the statute of limitations for a fraud penalty claim applied when "the last alleged act of fraud" was committed and did not look to the date of discovery. The only other appellate decision to state that the discovery rule might apply is *SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009), but in that case the evidence also supported equitable tolling and thus whether the doctrine was called discovery or tolling was, according to that court, "unimportant in practice." *Id.* at 739-40.[1]

[1] The Government also relies on *SEC v. Tambone*, 550 F.3d 106, 148-49 (1st Cir. 2008), but that case involved equitable tolling. *Id.* at 148 n.50.

2. The Government also asserts that the distinctions between discovery and equitable tolling are "unimportant." Opp. 8-12. But, as this case and *Bartek* both establish, that claim is untrue. The federal securities laws regulate a broad range of economic activity. *See* Pet. 28. Both here and in *Bartek*, the district courts held that the SEC made no allegations of concealing conduct or a self-concealing fraud. The district court here held that Plaintiff did not allege with particularity under Rule 9(b) that Defendants took affirmative acts to conceal their wrongdoing or that the conduct at issue was self-concealing. Pet. App. 39a. The SEC did not appeal those holdings in either case. *Compare* Brief of SEC at 35, *SEC v. Gabelli*, No. 10-3581 (2d Cir. Oct. 29, 2010) ("[W]e note that the Commission does not appeal from the district court's ruling rejecting the Commission's alternative argument that the statute of limitations was tolled by the 'fraudulent concealment' doctrine."), *with* Brief of SEC at 28, *SEC v. Bartek*, No. 11-10594 (5th Cir. Sept. 21, 2011) (using identical language); *see also Bartek*, slip op. at 5.[2] The SEC argued and the Sec-

[2] *See also* Tr. of Oral Argument at 27, *SEC v. Gabelli*, No. 10-3581 (2d Cir. June 2, 2011) ("We don't invoke the fraudulent concealment doctrine. We don't invoke tolling. What we invoke is the discovery rule."); Reply Brief of SEC at 36, *SEC v. Gabelli*, No. 10-3581 (2d Cir. Mar. 15, 2011) ("The discovery rule is an accrual doctrine which determines when a limitations period begins to run, whereas the other doctrines toll the statute of limitations after it has already begun to run, or estop the defendant from asserting the statute's bar based on his inequitable conduct.").

ond Circuit held here that regardless whether Petitioners concealed their alleged misconduct or engaged in self-concealing conduct, they must defend against an ancient claim because "fraud claims by their very nature involve self-concealing conduct" and "since the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted [a] fraudulent scheme, . . . the discovery rule defines when the claim accrues." Pet. App. 18a-19a. The *Bartek* court held to the contrary. *See Bartek*, slip op. at 10.[3]

3. This case also presents an important federal question that warrants this Court's review. *See* Pet. 19-27. Many federal statutes that permit the Government to seek penalties could be characterized as "anti-fraud," as the Court characterized Section 206 here. *See* Pet. 28, 35 n.15; *e.g.*, 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; 15 U.S.C. § 77q; 15 U.S.C. § 78n. Under the ruling below, the Government need not plead that the defendant engaged in a self-concealing fraud or concealed a fraud to seek a penalty for violations of those statutes based on ancient conduct. It need allege only "that the SEC first discovered the facts of [an alleged] fraudulent scheme" within five years of fil-

[3] *Bartek* purported to distinguish *Gabelli* claiming it "involved an inherently self-concealing fraudulent scheme." *Bartek*, slip op. at 9-10 & n.7. But the SEC correctly disavowed any reliance on the nature of the fraud or the conduct of the defendants here in precisely the same language it used in *Bartek*.

ing and did not know the claim earlier. *See* Pet. App. 21a. But the Government's detection of violations does not rest on the nature of the claim or difficulty of detection alone. It rests on the monies Congress appropriates for detection and the investigative priorities set and choices made in allocating resources, subjects "more appropriate for a congressional oversight hearing." *3M*, 17 F.3d at 1461.[4] The Government's failure to know of a fraud for reasons unrelated to the defendant's conduct does not "avoid the problems [for the defendant] of faded memories, lost witnesses and discarded documents." *Id.* It aggravates them. Moreover, equitable tolling applies in most cases where "the statute of limitations has run before the plaintiff obtained information essential to deciding whether he had a claim" and then only gives the plaintiff the time that is necessary. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990).[5] The Second Circuit's discovery rule would, for entire categories of claims, "leave the statute open for . . . eternity." Pet. 16.

---

[4] The SEC has stipulated that "[b]eginning in the mid 1990s, the SEC knew about the practice of market timing in mutual funds, and the decision was to let the marketplace regulate itself." *See* Mark T. Roche, Sean C. Adams, & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, BNA Securities Regulation & Law Report, July 23, 2012, at n.3 and accompanying text, *available at* 2012 WL 2949120.

[5] Here, the SEC knew all of the facts it bases its claim on well before the statute expired—it even asked for tolling agreements. It just chose to sit on the case after the tolling agreements expired.

Additionally, under the discovery rule, all evidence bearing on the Government's knowledge of the alleged violation, including evidence gathered in separate investigations, would be relevant and potentially discoverable, in derogation of the understanding that such investigations are confidential. Open-ended liability would also frustrate Congress' intent to "require the retention of . . . material[s] . . . for such a period as is reasonable and necessary for effective enforcement of the securities laws and the criminal laws, most of which have a five-year statute of limitations." *In re Retention of Records Relevant to Audits and Reviews*, Release No. 33-8180, 2003 WL 164273, at *19 n.39 (SEC Jan. 24, 2003) (quoting 148 Cong. Rec. S7419 (July 26, 2002) (statement of Sen. Leahy)).

4. The decision below is also inconsistent with this Court's decisions. The discovery rule delays the accrual of a *tort victim's* claim where he does not know (and could not have known) he was victimized or defrauded "to the date when he discovers he has been injured." *Cada*, 920 F.2d at 450. By its terms, it does not apply to Section 2462 where the Government is not a victim. Moreover, assuming discovery could ever be implied where a statute is silent, this Court has held that when a statute makes explicit exceptions to a statute of limitations, "additional exceptions are not to be implied." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quotation marks and citation omitted). In Section 2462, "Congress explicitly enumerate[d] certain exceptions to [the] general prohibition," *id.*, that a claim

for penalties may not be brought more than five years after the violation, providing an exception where "the offender or the property is [not] found within the United States in order that proper service may be made thereon." 28 U.S.C. § 2462. Section 2462 also provides that the accrual-on-violation rule applies "[e]xcept as otherwise provided by Act of Congress"—thereby precluding the courts from implying their own court-made rules. *Id.* Finally, "Congress implicitly excluded a general discovery rule [for Investment Advisers Act claims] by explicitly including a more limited one," *TRW*, 534 U.S. at 28-29, providing that claims would accrue on discovery only when brought by a private plaintiff claiming damages. *See* 28 U.S.C. § 1658(b). There is no evidence that Congress intended to write an open-ended discovery rule into the Advisers Act for penalty claims when it did not allow injured private party—without the Government's powers of discovery—more than three years to bring a damages claim. *Accord Bartek*, slip op. at 6.

5. The Government wrongly argues the holding below is supported by "a background principle that presumptively governs the application of federal limitations statutes unless Congress specifies otherwise." Opp. 12. At the time Congress adopted the precursor to Section 2462 in 1839 (Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322), *Bailey* had not even been decided. *See TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment) (discovery of "recent vintage"). Indeed, the "contemporary legal context" in which Section 2462 must be read, *Cottage Sav.*

Ass'n v. Comm'r of Internal Revenue, 499 U.S. 554, 562 (1991) (citation omitted), was expressed in *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871): a "court has no right or power to make [an exception to the statute of limitations], either directly, or by the indirect method of saying that the cause of action does not accrue, in case of a fraudulent concealment, until the discovery of the fraud." The background principle here is not the discovery rule, but that actions for "penalties . . . brought at any distance of time . . . would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.). Pet. 29. The Government's failure to address this Court's long-standing hostility to untimely actions for penalties speaks volumes.

6. The Government argues, citing *Exploration Co. v. United States*, 247 U.S. 435, 435 (1918), that it does not "matter . . . that the Commission is the plaintiff [and] is seeking civil penalties." Opp 14. But *Exploration Co.* involved a claim by the Government, as defrauded landowner, to cancel (and require the defendants to disgorge) land patents that had been obtained from it as a result of fraud; the defendants did not just commit a fraud but also "for the period named in the statute . . . conceal[ed] their fraudulent action from the knowledge of the agents of the government." *Id.* at 449. It did not involve penalties or the discovery rule. The Court stated the rule thusly: "It is not our belief that Congress intended that the government should be deprived of title to public lands by those

who *add* to the fraud by which they were obtained *artifices which enable them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years.*" *Id.* at 449-50 (emphasis added).[6] *Exploration Co.* provides no support for the Government's contention that it can seek a penalty, rather than the return of a defendant's ill-gotten gains, for violation of an antifraud statute outside the five-year period on the mere allegations that it has stated a claim and could not have discovered that claim earlier.

7. Further, although the Government quotes *Bailey v. Glover*, 88 U.S. 342, 349-50 (1874) (Opp. 16), for the proposition that "the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party," the Court merely stated this was the view of other courts. 88 U.S. at 348. There, "the bill contain[ed] a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which [was] sought to be redressed"—fraudulent concealment. *Id.* at 348-49; *accord Bartek*, slip op. at 8 & n.4. As the Government has elsewhere acknowledged, *Bailey* thus rests on the familiar "equitable tolling" principle—not applicable here—that a defendant who frustrates the

---

[6] *Exploration Co.* thus contained precisely the allegations that the district court concluded—and the Government did not dispute—were missing here. *Compare* Pet. App. 39a.

plaintiff's ability to bring a timely claim may not complain when the claim is brought outside the limitations period. Brief for the SEC as Amicus Curiae at 29 n.44, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (No. 90-333).[7]

8. Finally, the Government argues that "to bring an enforcement action like this one," the SEC must satisfy "the pleading standards for fraud," and that a court can "consider the passage of time" in setting a civil penalty. Opp. 17. But the Govern-

---

[7] The cases upon which the Government relies involve the doctrine of equitable tolling which the Government expressly disavowed here, which the district court held in an unappealed ruling did not apply, and which requires the plaintiff to plead and prove not just the elements of fraud but also that the defendant concealed a fraud or committed it in a self-concealing manner. *See Holland v. Florida*, 130 S. Ct. 2549, 2554 (2010) ("equitable tolling."); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-39 (2008) ("tolling"); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 & n.4 (1990) (tolling; construing *Glus* and *Holmberg* as cases "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 232, 232-33 (1959) (equitable estoppel); *Holmberg v. Armbrecht*, 327 U.S. 392, 393 (1946) (defendant "concealed his ownership of one hundred shares of the Bank stock under [another name]"); *Sherwood v. Sutton*, 21 F. Cas. 1303, 1305, 1307 (C.C.N.H. 1828) (noting "the concealment of the fraud avoids the bar of the statute of limitations" and "[i]t is material to state, that the point is not, whether mere ignorance of the fact on the part of the plaintiff ought to remove the bar; but whether this ignorance, resulting from the fraudulent concealment of the fact by the defendant, ought to have that effect").

ment did not appeal the district court's ruling that the Complaint did not allege concealed or self-concealing conduct with particularity under Rule 9(b), Pet. App. 39a, and the rule it successfully urged the court to adopt does not require the Government to make such allegations—under that rule, any alleged fraud is, by definition, self-concealing. Pet. App. 21a.[8] The Government also does not get any benefit from the language of the applicable penalty provisions because those provisions increase a defendant's punishment, and do not decrease it, when the claim is for fraud. 15 U.S.C. §§ 78u-2(b), 80b-9(e)(2)(A).[9]

[8] Regardless, the Government has taken the position that Rule 9(b) "does not apply to the SEC's claim under Rule 206(2), which is not scienter based and can be based on a showing of negligence." Brief of SEC at 6, *SEC v. Gruss*, No. 11 Civ. 2420 (RWS) (S.D.N.Y. Aug. 16, 2011).

[9] To the extent the Court believes the doctrinal differences are unimportant, we request it modify the question presented to whether penalty claims must be brought within five years of violation unless Congress expressly provides otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEWIS J. LIMAN
Counsel of Record
MICHAEL R. LAZERWITZ
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

EDWARD A. MCDONALD
KATHLEEN N. MASSEY
JOSHUA I. SHERMAN
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500

Counsel for Petitioners

August 14, 2012

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 9 - 2012
OFFICE OF THE CLERK

No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
Alida Y. Lasker
Katherine L. Wilson-Milne
Jared M. Gerber
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500
Counsel for Petitioners

Donald B. Verrilli, Jr.
Counsel of Record
Solicitor General
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
(201) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel for Respondent

November 9, 2012

Petition for Writ of Certiorari filed April 20, 2012
Petition for Writ of Certiorari granted September 25, 2012

Library of Congress
Law Library

TABLE OF CONTENTS

VOLUME 1

Relevant Docket Entries United States District Court for the Southern District of New York, No. 08-cv-3868 . . . . . JA 1

Relevant Docket Entries United States Court of Appeals for the Second Circuit, No. 10-3581 . . . . . JA 30

Relevant Docket Entries United States Court of Appeals for the Second Circuit, No. 10-3628 . . . . . JA 50

Relevant Docket Entries United States Court of Appeals for the Second Circuit, No. 10-3760 . . . . . JA 61

Complaint, (D. 1) filed April 24, 2008 . . . . . JA 72

Certain Exhibits to the Declaration of Kimberly C.J. Spiering in Support of Gabelli's Motion to Dismiss, (D. 14) filed July 25, 2008 . . . . . N/A

Exhibit F: Tolling Agreement between the Securities and Exchange Commission and Marc Gabelli, dated June 28, 2007 . . . . . JA 96

Exhibit G: Amendment to Tolling Agreement between the Securities and Exchange Commission and Marc Gabelli, dated September 26, 2007 ..... JA 99

Certain Exhibits to the Declaration of Joshua I. Sherman in Support of Alpert's Motion to Dismiss, (D. 18) filed July 25, 2008 ..... N/A

Exhibit: Tolling Agreement between the Securities and Exchange Commission and Bruce Alpert, dated May 2, 2007 ..... JA 101

Exhibit: Amendment to Tolling Agreement between the Securities and Exchange Commission and Bruce Alpert, dated September 14, 2007 ..... JA 103

Order, United States District Court, Southern District of New York, (D. 42) filed July 29, 2010 ..... JA 105

Order Entering Final Judgment, United States District Court, Southern District of New York, (D. 43) filed August 17, 2010 ..... JA 107

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Opinion of the United States Court of Appeals for the Second Circuit, decided August 1, 2011 ..... 1a-23a

Mandate Order of the United States Court of Appeals for the Second Circuit, filed November 30, 2011 ..... 24a-25a

Memorandum and Order of the United States District Court for the Southern District of New York, filed March 17, 2010 ..... 26a-51a

Order of the United States Court of Appeals for the Second Circuit, filed November 22, 2011 ..... 52a-53a

RELEVANT DOCKET ENTRIES

United States District Court for the Southern District of New York (Foley Square)

1:08-cv-03868-DAB

Securities and Exchange Commission v. Gabelli, et al.

Date Filed	#	Docket Text
04/24/2008	1	COMPLAINT against Marc J. Gabelli, Bruce Alpert. Document filed by Securities and Exchange Commission.(tve) (Entered: 04/25/2008)
04/24/2008		SUMMONS ISSUED as to Marc J. Gabelli, Bruce Alpert. (tve) (Entered: 04/25/2008)
04/24/2008		CASE REFERRED TO Judge Deborah A. Batts as possibly similar to 08-cv-3484. (tve) (Entered: 04/25/2008)
04/24/2008		Case Designated ECF. (tve) (Entered: 04/25/2008)
05/06/2008	2	NOTICE OF APPEARANCE by Lewis J. Liman on behalf of Marc J. Gabelli (Liman, Lewis) (Entered: 05/06/2008)
05/07/2008	3	NOTICE of Appearance /Amended Notice of Appearance and Demand for Service of

		Papers, dated May 7, 2008. Document filed by Marc J. Gabelli. (Liman, Lewis) (Entered: 05/07/2008)
05/07/2008	4	CERTIFICATE OF SERVICE of 3 on May 7, 2008. Service was made by Federal Express. Document filed by Marc J. Gabelli. (Liman, Lewis) (Entered: 05/07/2008)
05/09/2008	5	NOTICE OF APPEARANCE by Edward A. McDonald on behalf of Bruce Alpert (McDonald, Edward) (Entered: 05/09/2008)
05/09/2008	6	NOTICE OF APPEARANCE by Kathleen N. Massey on behalf of Bruce Alpert (Massey, Kathleen) (Entered: 05/09/2008)
05/12/2008		CASE ACCEPTED AS RELATED. Create association to 1:08-cv-03484-DAB. Notice of Assignment to follow. (jeh) (Entered: 05/13/2008)
05/12/2008		Magistrate Judge James C. Francis is so designated. (jeh) (Entered: 05/13/2008)
05/12/2008	7	NOTICE OF CASE ASSIGNMENT to Judge Deborah A. Batts. Judge Unassigned is no longer assigned to the case. (jeh) (Entered: 05/13/2008)

05/14/2008	8	STIPULATION OF EXTENSION OF TIME TO RESPOND TO COMPLAINT AND SUBSEQUENT BRIEFING SCHEDULE: (1) Defendants shall answer or otherwise move with respect to the complaint by 7/11/08. (2) Plaintiff shall oppose by 9/19/08. (3) Defendants Reply is due 10/20/08. Marc J. Gabelli answer due 7/11/2008; Bruce Alpert answer due 7/11/2008. (Motions due by 7/11/2008. Responses due by 9/19/2008, Replies due by 10/20/2008.) (Signed by Judge Deborah A. Batts on 5/14/08) (db) (Entered: 05/14/2008)
06/09/2008	9	NOTICE OF CHANGE OF ADDRESS by Edward A. McDonald on behalf of Bruce Alpert. New Address: Dechert LLP, 1095 Avenue of the Americas, New York, NY, USA 10036-6797, 212/698-3500. (McDonald, Edward) (Entered: 06/09/2008)
06/09/2008	10	NOTICE OF CHANGE OF ADDRESS by Kathleen N. Massey on behalf of Bruce Alpert. New Address: Dechert LLP, 1095 Avenue of the

		Americas, New York, NY, USA 10036-6797, 212/ 698-3500. (Massey, Kathleen) (Entered: 06/09/2008)
07/03/2008	11	MOTION for Kevin P. O'Rourke and Jill S. Henderson to Appear Pro Hac Vice. Document filed by Securities and Exchange Commission.(dle) (Entered: 07/07/2008)
07/10/2008	12	RULE 26(f) DISCOVERY PLAN REPORT.Document filed by Securities and Exchange Commission.(Blackburn, Robert) (Entered: 07/10/2008)
07/11/2008	20	ENDORSED LETTER addressed to Judge Deborah A. Batts from Kathleen N. Massey dated 7/9/08 Counsel for Mr. Alpert requests a two week extension of time within which defendants must respond to the complaint. Counsel for Mr. Gabelli has no objection to the foregoing, and requests that he be afforded an extension of equivalent length. Counsels for both defendants are agreeable to having the remaining dates in the briefing schedule extended by two weeks so that plaintiff files its opposition to any motion to dismiss on or

		before October 3, 2008, and defendants shall file their replies on or before November 3, 2008. ENDORSEMENT: Granted. So ordered., Set Deadlines/Hearing as to 16 MOTION to Dismiss. :(Responses due by 10/3/2008, Replies due by 11/3/2008.) (Signed by Judge Deborah A. Batts on 7/11/08) (mme) (Entered: 07/30/2008)
07/25/2008	13	MOTION to Dismiss */Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute Of Limitations, Dated July 25, 2008*. Document filed by Marc J. Gabelli.(Liman, Lewis) (Entered: 07/25/2008)
07/25/2008	14	DECLARATION of Kimberly C.J. Spiering, Dated July 25,2008 in Support re: 13 MOTION to Dismiss */Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute*

		Of Limitations, Dated July 25, 2008.. Document filed by Marc J. Gabelli. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Liman, Lewis) (Entered: 07/25/2008)
07/25/2008	15	MEMORANDUM OF LAW in Support re: 13 MOTION to Dismiss */Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute Of Limitations, Dated July 25, 2008*.. Document filed by Marc J. Gabelli. (Liman, Lewis) (Entered: 07/25/2008)
07/25/2008	16	MOTION to Dismiss. Document filed by Bruce Alpert.(Massey, Kathleen) (Entered: 07/25/2008)
07/25/2008	17	MEMORANDUM OF LAW in Support re: 16 MOTION to Dismiss.. Document filed by Bruce Alpert. (Massey, Kathleen) (Entered: 07/25/2008)
07/25/2008	18	DECLARATION of JOSHUA I. SHERMAN in Support re: 16 MOTION to Dismiss.. Document

		filed by Bruce Alpert. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P) (Massey, Kathleen) (Entered: 07/25/2008)
07/28/2008	19	CERTIFICATE OF SERVICE of Richard V. Conza, dated July 28, 2008 re service of Notice of Motion to Dismiss the Complaint for Failure to State a Claim and Failure to Plead Fraud with Particularity and Because the Relief Sought is Barred by Statute or by Statute of Limitations, dated July 25, 2008, including the Declaration of Kimberly Spiering with Exhibits A-G; Memorandum of Law in Support of Marc Gabelli's Motion to Dismiss on July 25, 2008. Service was made by Federal Express. Document filed by Marc J. Gabelli. (Liman, Lewis) (Entered: 07/28/2008)
09/04/2008	21	ORDER FOR ADMISSION PRO HAC VICE ON WRITTEN MOTION: granting 11 Motion

		for Kevin P. O'Rourke and Jill S. Henderson to Appear Pro Hac Vice. (Signed by Judge Deborah A. Batts on 9/4/2008) (jfe) (Entered: 09/04/2008)
10/03/2008	22	MEMORANDUM OF LAW in Opposition re: 13 MOTION to Dismiss *'Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute Of Limitations, Dated July 25, 2008.*, 16 MOTION to Dismiss.. Document filed by Securities and Exchange Commission. (Henderson, Jill) (Entered: 10/03/2008)
11/03/2008	23	REPLY MEMORANDUM OF LAW in Support re: 13 MOTION to Dismiss */Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute Of Limitations, Dated July 25, 2008.*. Document filed by Marc J. Gabelli. (Attachments: # 1

		Appendix A) (Liman, Lewis) (Entered: 11/03/2008)
11/03/2008	24	REPLY MEMORANDUM OF LAW in Support re: 16 MOTION to Dismiss.. Document filed by Bruce Alpert. (Massey, Kathleen) (Entered: 11/03/2008)
12/23/2008	25	ORDER: It is the practice of this Court that court-ordered discovery shall not commence until after the disposition of any motions to dismiss. This is a prudent and efficient use of time and effort. However, to the extent that the Parties are willing to proceed among themselves with discovery voluntarily, they may do so at any time. (Signed by Judge Deborah A. Batts on 12/23/2008) (jpo) (Entered: 12/23/2008)
03/17/2010	26	MEMORANDUM AND ORDER granting in part and denying in part 13 Motion to Dismiss. For the foregoing reasons, Defendants' Motions to Dismiss the Complaint are GRANTED in part, and DENIED in part. Plaintiff's claims under Section 10(b) and Rule 10b-5, as well as Section 17 of the Exchange Act are DISMISSED, with prejudice. Plaintiff's requests for

		an injunction and for civil monetary penalties under the Investment Advisers Act are DISMISSED, with prejudice. Defendants shall Answer the remaining claim for disgorgement under the Investment Advisers Act within 30 days of the date of this Order. SO ORDERED.(Signed by Judge Deborah A. Batts on 3/17/2010) (jmi) Modified on 3/18/2010 (jmi). (Entered: 03/18/2010)
04/16/2010	27	ANSWER to Complaint. Document filed by Marc J. Gabelli.(Peace, Breon) (Entered: 04/16/2010)
04/16/2010	28	ANSWER to Complaint. Document filed by Bruce Alpert.(Massey, Kathleen) (Entered: 04/16/2010)
04/19/2010	29	CERTIFICATE OF SERVICE of Richard V. Conza, dated April 19, 2010 re 27 . Document filed by Marc J. Gabelli. (Peace, Breon) (Entered: 04/19/2010)
05/06/2010	30	FIRST MOTION to Strike Document No. [27and 28] *Certain Affirmative Defenses*. Document filed by Securities and Exchange Commission.

		(Attachments: # 1 Text of Proposed Order)(O'Rourke, Kevin) (Entered: 05/06/2010)
05/06/2010	31	MEMORANDUM OF LAW in Support re: 30 FIRST MOTION to Strike Document No. [27and 28] *Certain Affirmative Defenses*.. Document filed by Securities and Exchange Commission. (O'Rourke, Kevin) (Entered: 05/06/2010)
05/24/2010	32	MEMORANDUM OF LAW in Opposition re: 30 FIRST MOTION to Strike Document No. [27and 28] *Certain Affirmative Defenses*.. Document filed by Marc J. Gabelli. (Liman, Lewis) (Entered: 05/24/2010)
05/24/2010	33	MEMORANDUM OF LAW in Opposition re: 30 FIRST MOTION to Strike Document No. [27and 28] *Certain Affirmative Defenses*.. Document filed by Bruce Alpert. (Massey, Kathleen) (Entered: 05/24/2010)
05/25/2010	34	CERTIFICATE OF SERVICE of Defendant's Memorandum of Law in Response and Opposition to Plaintiff's Motion to Strike Certain Affirmative Defenses, dated May 24, 2010 32 , and served on May 24,

		2010. Service was made by Federal Express. Document filed by Marc J. Gabelli. (Liman, Lewis) (Entered: 05/25/2010)
06/15/2010	35	MOTION to Dismiss *Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint*. Document filed by Securities and Exchange Commission. (O'Rourke, Kevin) (Entered: 06/15/2010)
06/15/2010	36	MEMORANDUM OF LAW in Support re: 35 MOTION to Dismiss *Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint*.. Document filed by Securities and Exchange Commission. (Attachments: # 1 Exhibit Proposed First Amended Complaint, # 2 Text of Proposed Order Proposed Order Dismissing Remedy of DIsgorgement and Entering FInal Judgment, # 3 Text of Proposed Order Alternative Proposed Order Granting Motion to Amend the Complaint and Entry of Final

		Judgment)(O'Rourke, Kevin) (Entered: 06/15/2010)
06/17/2010	37	ENDORSED LETTER addressed to Judge Deborah A. Batts from Lewis J. Liman dated 6/16/2010 re: Requesting that the Court briefly extend the time for defendants to file opposing papers until July 9, 2010. ENDORSEMENT: Granted. No further extensions. (Signed by Judge Deborah A. Batts on 6/17/2010) (jpo) (Entered: 06/17/2010)
07/09/2010	38	DECLARATION of David Oliwenstein, dated July 9, 2010 in Opposition re: 35 MOTION to Dismiss *Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint*.. Document filed by Marc J. Gabelli. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C Part 1, # 4 Exhibit C Part 2, # 5 Exhibit C Part 3, # 6 Exhibit D Part 1, # 7 Exhibit D Part 2, # 8 Exhibit E, # 9 Exhibit F, # 10 Exhibit G, # 11 Exhibit H, # 12 Exhibit I, # 13 Exhibit J, # 14 Exhibit K, # 15 Exhibit L, # 16 Exhibit M, # 17 Exhibit N, # 18 Exhibit O, # 19

		Exhibit P, # 20 Certificate of Service)(Liman, Lewis) (Entered: 07/09/2010)
07/09/2010	39	MEMORANDUM OF LAW in Opposition re: 35 MOTION to Dismiss *Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint*.. Document filed by Marc J. Gabelli. (Attachments: # 1 Certificate of Service)(Liman, Lewis) (Entered: 07/09/2010)
07/09/2010	40	MEMORANDUM OF LAW in Opposition re: 35 MOTION to Dismiss *Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint*.. Document filed by Bruce Alpert. (Massey, Kathleen) (Entered: 07/09/2010)
07/14/2010	41	REPLY MEMORANDUM OF LAW in Opposition re: 35 MOTION to Dismiss *Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint*.. Document filed by Securities and Exchange Commission. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B,

		# 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D)(O'Rourke, Kevin) (Entered: 07/14/2010)
07/29/2010	42	ORDER. Plaintiff's remaining remedy of disgorgement under the Investment Advisers Act of 1940 is DISMISSED without prejudice to refiling only if it obtains a reversal on appeal of any claim or remedy dismissed by the Court in its March 17, 2010 Memorandum and Order. (Signed by Judge Deborah A. Batts on 7/28/10) (djc) (Entered: 07/29/2010)
08/17/2010	43	JUDGMENT entering Final Judgment in this matter and each party to this action shall bear its own costs, disbursements, attorneys' fees and expenses. (Signed by Judge Deborah A. Batts on 8/17/10) (Attachments: # 1 notice of right to appeal)(ml) (Entered: 08/17/2010)
09/03/2010	44	NOTICE OF APPEAL from 42 Order, 26 Order on Motion to Dismiss, 43 Judgment. Document filed by Securities and Exchange Commission. (nd) (Entered: 09/07/2010)

09/07/2010		Transmission of Notice of Appeal to the District Judge re: 44 Notice of Appeal. (nd) (Entered: 09/07/2010)
09/07/2010		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 44 Notice of Appeal. (nd) (Entered: 09/07/2010)
09/07/2010		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 34 Certificate of Service Other, filed by Marc J. Gabelli, 1 Complaint filed by Securities and Exchange Commission, 20 Endorsed Letter, Set Motion and R&R Deadlines /Hearings,,,,,,, 42 Order, 11 MOTION for Kevin P. O'Rourke and Jill S. Henderson to Appear Pro Hac Vice. filed by Securities and Exchange Commission, 13 MOTION to Dismiss */Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute Of Limitations, Dated July 25, 2008*. filed by Marc J. Gabelli, 6

		Notice of Appearance filed by Bruce Alpert, 41 Reply Memorandum of Law in Oppisition to Motion, filed by Securities and Exchange Commission, 22 Memorandum of Law in Opposition to Motion, filed by Securities and Exchange Commission, 16 MOTION to Dismiss. filed by Bruce Alpert, 23 Reply Memorandum of Law in Support of Motion, filed by Marc J. Gabelli, 44 Notice of Appeal filed by Securities and Exchange Commission, 10 Notice of Change of Address filed by Bruce Alpert, 26 Order on Motion to Dismiss,, 39 Memorandum of Law in Opposition to Motion, filed by Marc J. Gabelli, 32 Memorandum of Law in Opposition to Motion filed by Marc J. Gabelli, 35 MOTION to Dismiss *Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint*. filed by Securities and Exchange Commission, 28 Answer to Complaint filed by Bruce Alpert, 38 Declaration in Opposition to Motion,, filed by

		Marc J. Gabelli, 19 Certificate of Service Other,, filed by Marc J. Gabelli, 31 Memorandum of Law in Support of Motion filed by Securities and Exchange Commission, 17 Memorandum of Law in Support of Motion filed by Bruce Alpert, 15 Memorandum of Law in Support of Motion, filed by Marc J. Gabelli, 37 Endorsed Letter, Set Deadlines/Hearings,, 2 Notice of Appearance filed by Marc J. Gabelli, 27 Answer to Complaint filed by Marc J. Gabelli, 5 Notice of Appearance filed by Bruce Alpert, 33 Memorandum of Law in Opposition to Motion filed by Bruce Alpert, 18 Declaration in Support of Motion, filed by Bruce Alpert, 14 Declaration in Support of Motion,, filed by Marc J. Gabelli, 36 Memorandum of Law in Support of Motion,, filed by Securities and Exchange Commission, 7 Notice of Case Assignment/Reassignment, 9 Notice of Change of Address filed by Bruce Alpert, 21 Order on Motion to Appear Pro Hac Vice, 3 Notice (Other) filed by Marc J. Gabelli, 40

		Memorandum of Law in Opposition to Motion filed by Bruce Alpert, 30 FIRST MOTION to Strike Document No. [27and 28] *Certain Affirmative Defenses*. filed by Securities and Exchange Commission, 43 Judgment, 29 Certificate of Service Other filed by Marc J. Gabelli, 12 Rule 26(f) Discovery Plan Report filed by Securities and Exchange Commission, 24 Reply Memorandum of Law in Support of Motion filed by Bruce Alpert, 4 Certificate of Service Other filed by Marc J. Gabelli, 25 Order, 8 Stipulation and Order, Set Deadlines,, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 09/07/2010)
09/09/2010	45	NOTICE OF CROSS APPEAL from 42 Order, 26 Memorandum and Order, 43 Judgment,. Document filed by Marc J. Gabelli. Filing fee $ 455.00, receipt number E 913860. (nd) (Entered: 09/09/2010)
09/09/2010		Transmission of Notice of Appeal to the District Judge re: 45 Notice of Cross Appeal. (nd) (Entered: 09/09/2010)

09/09/2010		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 45 Notice of Cross Appeal. (nd) (Entered: 09/09/2010)
09/09/2010		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 45 Notice of Cross Appeal filed by Marc J. Gabelli, 34 Certificate of Service Other, filed by Marc J. Gabelli, 1 Complaint filed by Securities and Exchange Commission, 20 Endorsed Letter, Set Motion and R&R Deadlines /Hearings,,,,,,, 42 Order, 11 MOTION for Kevin P. O'Rourke and Jill S. Henderson to Appear Pro Hac Vice. filed by Securities and Exchange Commission, 13 MOTION to Dismiss /Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute Of Limitations, Dated July 25, 2008. filed by Marc J. Gabelli, 6 Notice of Appearance filed by Bruce Alpert, 41 Reply Memorandum of Law in

		Oppisition to Motion, filed by Securities and Exchange Commission, 22 Memorandum of Law in Opposition to Motion, filed by Securities and Exchange Commission, 16 MOTION to Dismiss. filed by Bruce Alpert, 23 Reply Memorandum of Law in Support of Motion, filed by Marc J. Gabelli, 44 Notice of Appeal filed by Securities and Exchange Commission, 10 Notice of Change of Address filed by Bruce Alpert, 26 Order on Motion to Dismiss,, 39 Memorandum of Law in Opposition to Motion, filed by Marc J. Gabelli, 32 Memorandum of Law in Opposition to Motion filed by Marc J. Gabelli, 35 MOTION to Dismiss Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint. filed by Securities and Exchange Commission, 28 Answer to Complaint filed by Bruce Alpert, 38 Declaration in Opposition to Motion,, filed by Marc J. Gabelli, 19 Certificate of Service Other,, filed by Marc J. Gabelli, 31 Memorandum of

		Law in Support of Motion filed by Securities and Exchange Commission, 17 Memorandum of Law in Support of Motion filed by Bruce Alpert, 15 Memorandum of Law in Support of Motion, filed by Marc J. Gabelli, 37 Endorsed Letter, Set Deadlines/Hearings,, 2 Notice of Appearance filed by Marc J. Gabelli, 27 Answer to Complaint filed by Marc J. Gabelli, 5 Notice of Appearance filed by Bruce Alpert, 33 Memorandum of Law in Opposition to Motion filed by Bruce Alpert, 18 Declaration in Support of Motion, filed by Bruce Alpert, 14 Declaration in Support of Motion,, filed by Marc J. Gabelli, 36 Memorandum of Law in Support of Motion,, filed by Securities and Exchange Commission, 7 Notice of Case Assignment/Reassignment, 9 Notice of Change of Address filed by Bruce Alpert, 21 Order on Motion to Appear Pro Hac Vice, 3 Notice (Other) filed by Marc J. Gabelli, 40 Memorandum of Law in Opposition to Motion filed by Bruce Alpert, 30 FIRST

		MOTION to Strike Document No. [27and 28] Certain Affirmative Defenses. filed by Securities and Exchange Commission, 43 Judgment, 29 Certificate of Service Other filed by Marc J. Gabelli, 12 Rule 26(f) Discovery Plan Report filed by Securities and Exchange Commission, 24 Reply Memorandum of Law in Support of Motion filed by Bruce Alpert, 4 Certificate of Service Other filed by Marc J. Gabelli, 25 Order, 8 Stipulation and Order, Set Deadlines,, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 09/09/2010)
09/16/2010	46	NOTICE OF CROSS APPEAL from 42 Order, 26 Order on Motion to Dismiss,, 43 Judgment,. Document filed by Bruce Alpert. Filing fee $ 455.00, receipt number E 915355. (nd) (Entered: 09/20/2010)
09/20/2010		Transmission of Notice of Appeal to the District Judge re: 46 Notice of Cross Appeal. (nd) (Entered: 09/20/2010)
09/20/2010		Transmission of Notice of Appeal and Certified Copy of

		Docket Sheet to US Court of Appeals re: 46 Notice of Cross Appeal. (nd) (Entered: 09/20/2010)
09/20/2010		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 46 Notice of Cross Appeal filed by Bruce Alpert, 45 Notice of Cross Appeal filed by Marc J. Gabelli, 34 Certificate of Service Other, filed by Marc J. Gabelli, 1 Complaint filed by Securities and Exchange Commission, 20 Endorsed Letter, Set Motion and R&R Deadlines /Hearings,,,,,,, 42 Order, 11 MOTION for Kevin P. O'Rourke and Jill S. Henderson to Appear Pro Hac Vice. filed by Securities and Exchange Commission, 13 MOTION to Dismiss /Notice Of Motion To Dismiss The Complaint For Failure To State A Claim And Failure To Plead Fraud With Particularity And Because The Relief Sought Is Barred By Statute Or By Statute Of Limitations, Dated July 25, 2008. filed by Marc J. Gabelli, 6 Notice of Appearance filed by Bruce Alpert, 41 Reply Memorandum of Law in

		Oppisition to Motion, filed by Securities and Exchange Commission, 22 Memorandum of Law in Opposition to Motion, filed by Securities and Exchange Commission, 16 MOTION to Dismiss. filed by Bruce Alpert, 23 Reply Memorandum of Law in Support of Motion, filed by Marc J. Gabelli, 44 Notice of Appeal filed by Securities and Exchange Commission, 10 Notice of Change of Address filed by Bruce Alpert, 26 Order on Motion to Dismiss,, 39 Memorandum of Law in Opposition to Motion, filed by Marc J. Gabelli, 32 Memorandum of Law in Opposition to Motion filed by Marc J. Gabelli, 35 MOTION to Dismiss Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended Complaint. filed by Securities and Exchange Commission, 28 Answer to Complaint filed by Bruce Alpert, 38 Declaration in Opposition to Motion,, filed by Marc J. Gabelli, 19 Certificate of Service Other,, filed by Marc J. Gabelli, 31 Memorandum of

		Law in Support of Motion filed by Securities and Exchange Commission, 17 Memorandum of Law in Support of Motion filed by Bruce Alpert, 15 Memorandum of Law in Support of Motion, filed by Marc J. Gabelli, 37 Endorsed Letter, Set Deadlines/Hearings,, 2 Notice of Appearance filed by Marc J. Gabelli, 27 Answer to Complaint filed by Marc J. Gabelli, 5 Notice of Appearance filed by Bruce Alpert, 33 Memorandum of Law in Opposition to Motion filed by Bruce Alpert, 18 Declaration in Support of Motion, filed by Bruce Alpert, 14 Declaration in Support of Motion,, filed by Marc J. Gabelli, 36 Memorandum of Law in Support of Motion,, filed by Securities and Exchange Commission, 7 Notice of Case Assignment/Reassignment, 9 Notice of Change of Address filed by Bruce Alpert, 21 Order on Motion to Appear Pro Hac Vice, 3 Notice (Other) filed by Marc J. Gabelli, 40 Memorandum of Law in Opposition to Motion filed by Bruce Alpert, 30 FIRST

		MOTION to Strike Document No. [27and 28] Certain Affirmative Defenses. filed by Securities and Exchange Commission, 43 Judgment, 29 Certificate of Service Other filed by Marc J. Gabelli, 12 Rule 26(f) Discovery Plan Report filed by Securities and Exchange Commission, 24 Reply Memorandum of Law in Support of Motion filed by Bruce Alpert, 4 Certificate of Service Other filed by Marc J. Gabelli, 25 Order, 8 Stipulation and Order, Set Deadlines,, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 09/20/2010)
08/01/2011	47	OPINION of USCA as to 44 Notice of Appeal filed by Securities and Exchange Commission, 45 Notice of Cross Appeal filed by Marc J. Gabelli, 46 Notice of Cross Appeal filed by Bruce Alpert USCA Case Number 10-3581-cv(L). For the foregoing reasons, we grant the SEC's appeal in all respect, dismiss the cross-appeals for want of appellate jurisdiction, and remand to the District Court for proceedings consistent with this opinion. Catherine

		O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 08/01/2011. (nd) Modified on 8/1/2011 (nd). (Entered: 08/01/2011)
08/01/2011		Transmission of USCA Mandate/Order to the District Judge re: 47 USCA Opinion. (nd) (Entered: 08/01/2011)
08/11/2011	48	ORDER: Accordingly, the Court deems the disgorgement claim to have been restored, along with the SEC's other claims, by the Second Circuit's Mandate of August 17, 2010. The issues being fully joined, Parties shall appear before the Court for a conference pursuant to Fed. R. Civ. P. 16 on August 26, 2011 at 11:00am. (Initial Conference set for 8/26/2011 at 11:00 AM before Judge Deborah A. Batts.) (Signed by Judge Deborah A. Batts on 8/11/2011) (mro) Modified on 8/12/2011 (mro). (Entered: 08/11/2011)
08/22/2011	49	ORDER: The Court is in receipt of Defendant's letter dated August 19, 2011. The previously scheduled Rule 16 conference is adjourned sine die. Parties shall provide the Court with a joint status update by letter 45 days

		from the date of this order. So Ordered (Signed by Judge Deborah A. Batts on 8/22/2011) (js) (Entered: 08/22/2011)

United States Court of Appeals
for the Second Circuit

10-3581

Securities and Exchange Commission v. Gabelli, et al.

09/07/2010	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Securities and Exchange Commission, FILED. [102101] [10-3581]
09/07/2010	2	ELECTRONIC INDEX, in lieu of record, FILED.[102108] [10-3581]
09/07/2010	3	DISTRICT COURT JUDGMENT, dated 08/17/2010, RECEIVED. [102112] [10-3581]
09/07/2010	4	DISTRICT COURT ORDER, dated 07/29/2010, RECEIVED.[102113] [10-3581]
09/09/2010	8	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. [103593] [10-3628]
09/09/2010	9	PAYMENT OF DOCKETING FEE, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, district court receipt # E 913860, FILED.[103595] [10-3628]

09/09/2010 10 ELECTRONIC INDEX, in lieu of record, FILED.[103598] [10-3628]

09/09/2010 11 DISTRICT COURT JUDGMENT, dated 08/17/2010, RECEIVED. [103602] [10-3628]

09/09/2010 12 DISTRICT COURT ORDER, dated 07/29/2010, RECEIVED.[103606] [10-3628]

09/10/2010 14 NOTE: See lead case, 10-3581, containing complete set of docket entries.[103609] [10-3628]

09/10/2010 15 NEW CASE 10-3628, on behalf of Marc J. Gabelli, FILED.[103614] [10-3581]

09/16/2010 18 NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 09/16/2010 by CM/ECF. [107592] [10-3581]

09/16/2010 19 ATTORNEY, Dominick V. Freda, [18], in place of attorney Kevin P. O'Rourke, SUBSTITUTED.[107602] [10-3581]

09/16/2010 20 ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant-Cross-Appellee Securities and Exchange

Commission, FILED. Service date 09/16/2010 by CM/ECF.[107613] [10-3581]

09/16/2010 21 FORM C, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 09/16/2010 by CM/ECF.[107621] [10-3581]

09/16/2010 22 FORM D, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 09/16/2010 by CM/ECF.[107627] [10-3581]

09/16/2010 23 DEFECTIVE DOCUMENT, Form C, [21], on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED.[107641] [10-3581]

09/17/2010 24 FORM C, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 09/17/2010 by CM/ECF.[107877] [10-3581]

09/20/2010 25 DEFECTIVE DOCUMENT, Form C [23], on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, CURED.[108603] [10-3581]

09/20/2010 27 NOTICE OF CIVIL APPEAL, with district court docket, on behalf of

Appellee-Cross-Appellant Bruce Alpert, FILED. [109713] [10-3760]

09/20/2010 28 PAYMENT OF DOCKETING FEE, on behalf of Appellee-Cross-Appellant Bruce Alpert, district court receipt # E 915355, FILED.[109718] [10-3760]

09/20/2010 29 ELECTRONIC INDEX, in lieu of record, FILED.[109720] [10-3760]

09/20/2010 30 DISTRICT COURT ORDER, dated 07/29/2010, RECEIVED.[109727] [10-3760]

09/21/2010 32 NOTE: See lead case, 10-3581, containing complete set of docket entries.[109729] [10-3760]

09/21/2010 33 NEW CASE 10-3760, on behalf of Bruce Alpert, FILED.[109738] [10-3581]

09/22/2010 36 SCHEDULING NOTIFICATION, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, informing Court of proposed due date 10/29/2010, RECEIVED. Service date 09/22/2010 by CM/ECF.[110722] [10-3581, 10-3628, 10-3760]

09/24/2010 39 DEFECTIVE DOCUMENT, Form C, [112168-2], on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED.[112195] [10-3628]

09/24/2010 40 NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3628, 10-3760, FILED. Service date 09/24/2010 by CM/ECF. [112350] [10-3581, 10-3628, 10-3760]

09/24/2010 41 ATTORNEY, Dominick V. Freda, [40], in place of attorney Kevin P. O'Rourke, SUBSTITUTED.[112436] [10-3628]

09/24/2010 42 ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 09/24/2010 by CM/ECF.[112876] [10-3581]

09/28/2010 46 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant-Cross-Appellee Securities and Exchange Commission: Brief due on 10/29/2010. Joint Appendix due on 10/29/2010, FILED.[114508] [10-3581]

09/28/2010 47 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant-Cross-Appellee Securities and Exchange Commission: Brief due on 10/29/2010. Joint Appendix due on 10/29/2010, FILED.[114539] [10-3581]

09/29/2010 48 CAMP CONFERENCE ORDER: Type of Conference: Telephonic, Scheduled Date of Conference: 10/19/2010, Start Time: 3:00 PM, endorsed by Lisa J. Greenberg, FILED.[115191] [10-3581, 10-3628, 10-3760]

09/29/2010 49 CAMP CONFERENCE ORDER: Type of Conference: Amended Telephonic, Scheduled Date of Conference: 10/19/2010, Start Time: 3:00 PM, Conference Note: Correction of docket number on Order., endorsed by Lisa J. Greenberg, FILED.[115194] [10-3581, 10-3628, 10-3760]

09/29/2010 50 FORM C, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, FILED. Service date 09/29/2010 by CM/ECF.[115726] [10-3581, 10-3628]

09/29/2010 51 ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee-Cross-Appellant Bruce Alpert, FILED. Service date 09/29/2010 by email.[115908] [10-3581]

09/29/2010 52 NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce

Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email. [115909] [10-3581, 10-3628, 10-3760]

09/29/2010 53 FORM C, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email.[115911] [10-3581, 10-3628, 10-3760]

09/29/2010 54 FORM D, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email.[115912] [10-3581, 10-3628, 10-3760]

09/30/2010 55 DEFECTIVE DOCUMENT, Form C [39], on behalf of Appellee-Cross-Appellant Marc J. Gabelli, CURED.[115951] [10-3628]

09/30/2010 57 ATTORNEY, Kathleen Nicholson Massey for Bruce Alpert, in case 10-3760 Kathleen Nicholson Massey for Bruce Alpert, in case 10-3628 Kathleen Nicholson Massey for Bruce Alpert, in case 10-3581 , [52], ADDED.[115954] [10-3581, 10-3628, 10-3760]

09/30/2010 58 DEFECTIVE DOCUMENT, Form C, [53], on behalf of Appellee-Cross-Appellant Bruce Alpert, FILED.[115957] [10-3760]

09/30/2010 59 FORM D, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 09/30/2010 by CM/ECF.[116174] [10-3581, 10-3760]

09/30/2010 60 FORM C, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3760, 10-3581, Appellee Bruce Alpert in 10-3628, FILED. Service date 09/30/2010 by email.[116254] [10-3760, 10-3581, 10-3628]

10/01/2010 61 DEFECTIVE DOCUMENT, Form C [58], on behalf of Appellee-Cross-Appellant Bruce Alpert, CURED.[117034] [10-3760]

10/01/2010 65 NEW CASE MANAGER, Wilson Dudley, ASSIGNED.[117394] [10-3581]

10/05/2010 70 NEW CASE MANAGER, Wilson Dudley, ASSIGNED.[119378] [10-3628]

10/05/2010 71 NEW CASE MANAGER, Wilson Dudley, ASSIGNED.[119383] [10-3760]

10/29/2010 73 BRIEF, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 10/29/2010 by CM/ECF.[135767] [10-3581]

10/29/2010 74 DEFECTIVE DOCUMENT, Brief, [73], on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED.[135970] [10-3581]

10/29/2010 75 APPENDIX, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 10/29/2010 by CM/ECF. [136008] [10-3581]

10/29/2010 76 CORRECTED BRIEF, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 10/29/2010 by CM/ECF. [136019] [10-3581]

10/29/2010 77 DEFECTIVE DOCUMENT brief, [74], on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, CURED.[136027] [10-3581]

11/11/2010 83 SCHEDULING NOTIFICATION, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, informing Court of proposed due date 01/14/2011, RECEIVED. Service date 11/11/2010 by email.[144497] [10-3581, 10-3628, 10-3760]

11/12/2010 86 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee-Cross-Appellant Bruce Alpert and

Marc J. Gabelli Brief due as 01/04/2011, FILED.[144903] [10-3581]

11/12/2010 87 SCHEDULING NOTIFICATION, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, informing Court of proposed due date 01/14/2011, RECEIVED. Service date 11/12/2010 by CM/ECF.[145249] [10-3581, 10-3628, 10-3760]

11/15/2010 90 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee-Cross-Appellant Marc J. Gabelli Brief due as 01/14/2011, FILED.[146369] [10-3581]

11/30/2010 92 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee-Cross-Appellant Marc J. Gabelli , FILED.[155184] [10-3628]

01/14/2011 93 BRIEF, on behalf of Appellee-Cross-Appellant Bruce Alpert, FILED. Service date 01/14/2011 by CM/ECF. [187519] [10-3581]

01/14/2011 94 BRIEF, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 01/14/2011 by CM/ECF. [187529] [10-3581]

01/14/2011 95 BRIEF, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED.

Service date 01/14/2011 by CM/ECF. [187531] [10-3581]

01/18/2011 96 NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 01/18/2011 by CM/ECF. [187720] [10-3581, 10-3628, 10-3760]

01/18/2011 97 ATTORNEY, David R. Lurie for Marc J. Gabelli, in case 10-3581 , [96], ADDED.[187983] [10-3581]

01/25/2011 102 SCHEDULING NOTIFICATION, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, 10-3628, 10-3760, informing Court of proposed due date 03/15/2011, RECEIVED. Service date 01/25/2011 by CM/ECF.[194157] [10-3581, 10-3628, 10-3760]

01/31/2011 103 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant-Cross-Appellee Securities and Exchange Commission Response/Reply Brief due date as 03/15/2011; FILED.[198026] [10-3581]

02/28/2011 104 MOTION, to extend time to 04/14/2011, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J.

Gabelli in 10-3760, FILED. Service date 02/28/2011 by CM/ECF. [220959] [10-3581, 10-3628, 10-3760]

02/28/2011 106 MOTION, to extend time to file Reply brief, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 02/28/2011 by CM/ECF. [221092] [10-3581, 10-3628, 10-3760]--[Edited 02/28/2011 by WD]

03/02/2011 111 MOTION ORDER, granting motion to extend time to file Reply brief filed by Appellee-Cross-Appellant Marc J. Gabelli and Bruce Alpert, [106], [104], FILED. [224040][111] [10-3581, 10-3628, 10-3760]

03/15/2011 112 RESPONSE AND REPLY BRIEF, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 03/15/2011 by CM/ECF.[235356] [10-3581]--[Edited 03/18/2011 by WD]

03/25/2011 114 ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Lewis J Liman for Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 03/25/2011 by CM/ECF. [244481] [10-3581]

03/28/2011 116 ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer

Attorney Mr. Dominick V. Freda for Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, 10-3628, 10-3760, FILED. Service date 03/28/2011 by CM/ECF. [246449] [10-3581, 10-3628, 10-3760]

03/29/2011 118 ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Kathleen Nicholson Massey for Appellee-Cross-Appellant Bruce Alpert in 10-3581, Attorney Kathleen Nicholson Massey for Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 03/29/2011 by CM/ECF. [247822] [10-3581, 10-3628, 10-3760]

03/30/2011 121 CASE CALENDARING, for the week of 05/31/2011, PROPOSED.[249020] [10-3581, 10-3628, 10-3760]

03/31/2011 122 NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 03/31/2011 by CM/ECF. [250004] [10-3581]

03/31/2011 123 ATTORNEY, Katherine L. Wilson-Milne for Marc J. Gabelli, in case 10-3760 , [122], ADDED.[250085] [10-3581, 10-3628, 10-3760]

04/14/2011 126 REPLY BRIEF, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date

04/14/2011 by CM/ECF. [263692] [10-3581]

04/14/2011 127 REPLY BRIEF, on behalf of Appellee-Cross-Appellant Bruce Alpert, FILED. Service date 04/14/2011 by CM/ECF. [263771] [10-3581]

04/15/2011 130 CASE CALENDARING, argument for 06/02/2011, SET.[264829] [10-3581, 10-3628, 10-3760]

04/19/2011 131 ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. [267508] [10-3581, 10-3628, 10-3760]

04/20/2011 132 NOTICE OF HEARING DATE ACKNOWLEDMENT, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 04/20/2011 by CM/ECF. [268366] [10-3581]

04/21/2011 133 NOTICE OF HEARING DATE ACKNOWLEDMENT, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, FILED. Service date 04/21/2011 by CM/ECF. [270282] [10-3581]

04/22/2011 134 NOTICE OF HEARING DATE ACKNOWLEDMENT, on behalf of Appellee-Cross-Appellant Bruce Alpert, FILED. Service date

04/22/2011 by CM/ECF. [271173] [10-3581]

05/09/2011 135 FRAP 28(j) LETTER, dated 05/09/2011, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, RECEIVED. Service date 05/09/2011 by CM/ECF.[284073] [10-3581]

05/12/2011 137 FRAP 28(j) LETTER, dated 05/12/2011, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, RECEIVED. Service date 05/12/2011 by CM/ECF.[287590] [10-3581]

05/18/2011 140 FRAP 28(j) LETTER, dated 05/18/2011, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, RECEIVED. Service date 05/18/2011 by CM/ECF.[292843] [10-3581]

05/26/2011 143 ORDER, dated 05/26/2011, inviting the parties to address, in supplemental letter briefs of no more than three pages, whether this Court has jurisdiction to hear challenges to claims voluntarily dismissed without prejudice pursuant to Rule 41(a) under the conditions identified in Purdy-that is, on these facts, whether this Court has jurisdiction over the cross-appeal. Any letter briefs the parties wish to submit should be filed with the Court no later than 12p.m.

on Wednesday, June 1. FILED.[300798] [10-3581]

06/01/2011 144 SUPPLEMENTAL LETTER BRIEF, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 06/01/2011 by CM/ECF.[303493] [10-3581]--[Edited 06/01/2011 by BM]

06/01/2011 146 SUPPLEMENTAL BRIEF, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 06/01/2011 by CM/ECF.[303637] [10-3581, 10-3628, 10-3760]

06/02/2011 148 CASE, before DAL, DC, C.JJ., JSR, D.J., HEARD.[304584] [10-3581, 10-3628, 10-3760]

06/09/2011 149 LETTER, requesting an oral argument CD dated 06/03/2011, on behalf of Ryan Paulsen w/haynesboone, RECEIVED and forward to the calendar team. Service date 06/09/2011 by US mail.[310820] [10-3581]--[Edited 06/09/2011 by VM]

06/09/2011 150 REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[310857] [10-3581, 10-3628, 10-3760]

06/09/2011 151 ARGUMENT CD, TRANSMITTED. [310858] [10-3581, 10-3628, 10-3760]

06/09/2011 152 REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[311082] [10-3581, 10-3628, 10-3760]

06/09/2011 153 ARGUMENT CD, TRANSMITTED. [311085] [10-3581, 10-3628, 10-3760]

06/14/2011 154 FRAP 28(j) LETTER, dated 06/14/2011, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, RECEIVED. Service date 06/14/2011 by CM/ECF.[314452] [10-3581]

06/22/2011 156 FRAP 28(j) LETTER, dated 06/22/2011, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission, RECEIVED. Service date 06/22/2011 by CM/ECF.[321584] [10-3581]

08/01/2011 160 NEW CASE MANAGER, Anna Greenidge, ASSIGNED.[352270] [10-3581, 10-3628, 10-3760]

08/01/2011 161 OPINION, reversing the district court's judgment and remanding for further proceedings, by DAL, DC, RAKOFF, FILED.[352297] [10-3581]

08/01/2011 162 CERTIFIED ORDER, dated 08/01/2011, to SDNY, ISSUED. [352310] [10-3581]

08/01/2011 164 OPINION, dismissing the cross-appeals for want of appellate

jurisdiction, by DAL, DC, RAKOFF, FILED.[352329] [10-3628, 10-3760]

08/01/2011 167 JUDGMENT, FILED.[353542] [10-3581, 10-3628, 10-3760]

08/04/2011 168 INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED.[356296] [10-3581, 10-3628, 10-3760]

08/16/2011 169 The OPINION PRICE is $3.80.[366029] [10-3581]

09/07/2011 170 MOTION, to extend time to 10/14/2011 to file petition for rehearing/rehearing en banc, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 09/07/2011 by CM/ECF. [383660] [10-3581]--[Edited 09/07/2011 by AG]

09/19/2011 175 MOTION ORDER, granting motion to extend time to 10/14/2011 to file petition for rehearing/rehearing en banc [170] filed by Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, by DC, FILED. [394399][175] [10-3581, 10-3628, 10-3760]

10/14/2011 176 PETITION FOR REHEARING /REHEARING EN BANC, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 10/14/2011 by CM/ECF.[417517] [10-3581]

10/14/2011 179 LETTER, dated 10/14/2011, on behalf of Appellee-Cross-Appellant Bruce Alpert, RECEIVED. Service date 10/14/2011 by CM/ECF.[418140] [10-3581]

11/22/2011 182 ORDER, PETITION FOR REHEARING/PETITION FOR REHEARING EN BANC DENIED, FILED.[454531] [10-3581, 10-3628, 10-3760]

11/28/2011 183 MOTION, to stay mandate, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 11/28/2011 by CM/ECF. [457667] [10-3581]

11/30/2011 190 MOTION ORDER, granting motion to stay mandate [183] filed by Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, granting motion to stay mandate [457672-2] filed by Appellee-Cross-Appellant Marc J. Gabelli, in 10-3628, 10-3760, by DAL, DC, RAKOFF, FILED. [460136] [190] [10-3581, 10-3628, 10-3760]

02/14/2012 191 U.S. SUPREME COURT NOTICE, granting Appellee-Cross-Appellant Bruce Alpert and Marc J. Gabelli in 10-3581, Appellee Bruce Alpert and Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli and Appellee-Cross-Appellant

Bruce Alpert in 10-3760 extension to file Writ of Certiorari, FILED.[526826] [10-3581, 10-3628, 10-3760]

03/12/2012 192 U.S. SUPREME COURT NOTICE, granting Appellee-Cross-Appellant Bruce Alpert and Marc J. Gabelli in 10-3581, Appellee Bruce Alpert and Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli and Appellee-Cross-Appellant Bruce Alpert in 10-3760 extension to file Writ of Certiorari, FILED.[549912] [10-3581, 10-3628, 10-3760]

04/26/2012 193 U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 04/24/2012, U.S. Supreme Court docket # 11-1274, RECEIVED. [591308] [10-3581, 10-3628, 10-3760]

09/28/2012 194 U.S. SUPREME COURT NOTICE, dated 09/25/2012, U.S. Supreme Court docket # 11-1274, stating the petition for writ of certiorari is granted, RECEIVED.[733510] [10-3581, 10-3628, 10-3760]

United States Court of Appeals
for the Second Circuit

10-3628

Securities and Exchange Commission v. Gabelli, et al.

09/09/2010	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. [103593] [10-3628]
09/09/2010	2	PAYMENT OF DOCKETING FEE, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, district court receipt # E 913860, FILED.[103595] [10-3628]
09/09/2010	3	ELECTRONIC INDEX, in lieu of record, FILED.[103598] [10-3628]
09/09/2010	4	DISTRICT COURT JUDGMENT, dated 08/17/2010, RECEIVED. [103602] [10-3628]
09/09/2010	5	DISTRICT COURT ORDER, dated 07/29/2010, RECEIVED.[103606] [10-3628]
09/10/2010	7	NOTE: See lead case, 10-3581, containing complete set of docket entries.[103609] [10-3628]
09/22/2010	10	SCHEDULING NOTIFICATION, on behalf of Appellant-Cross-Appellee

Securities and Exchange Commission in 10-3581, informing Court of proposed due date 10/29/2010, RECEIVED. Service date 09/22/2010 by CM/ECF.[110722] [10-3581, 10-3628, 10-3760]

09/23/2010 11 FORM C, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 09/23/2010 by CM/ECF.[112168] [10-3628]

09/23/2010 12 FORM D, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 09/23/2010 by CM/ECF.[112169] [10-3628]

09/24/2010 13 DEFECTIVE DOCUMENT, Form C, [11], on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED.[112195] [10-3628]

09/24/2010 14 NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3628, 10-3760, FILED. Service date 09/24/2010 by CM/ECF. [112350] [10-3581, 10-3628, 10-3760]

09/24/2010 15 ATTORNEY, Dominick V. Freda, [14], in place of attorney Kevin P. O'Rourke, SUBSTITUTED.[112436] [10-3628]

09/24/2010 16 ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 09/24/2010 by CM/ECF.[112784] [10-3628]

09/29/2010 18 CAMP CONFERENCE ORDER: Type of Conference: Telephonic, Scheduled Date of Conference: 10/19/2010, Start Time: 3:00 PM, endorsed by Lisa J. Greenberg, FILED.[115191] [10-3581, 10-3628, 10-3760]

09/29/2010 19 CAMP CONFERENCE ORDER: Type of Conference: Amended Telephonic, Scheduled Date of Conference: 10/19/2010, Start Time: 3:00 PM, Conference Note: Correction of docket number on Order., endorsed by Lisa J. Greenberg, FILED. [115194] [10-3581, 10-3628, 10-3760]

09/29/2010 20 FORM C, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, FILED. Service date 09/29/2010 by CM/ECF.[115726] [10-3581, 10-3628]

09/29/2010 21 NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED.

Service date 09/29/2010 by email. [115909] [10-3581, 10-3628, 10-3760]

09/29/2010 22 FORM C, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email.[115911] [10-3581, 10-3628, 10-3760]

09/29/2010 23 FORM D, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email.[115912] [10-3581, 10-3628, 10-3760]

09/30/2010 24 DEFECTIVE DOCUMENT, Form C [13], on behalf of Appellee-Cross-Appellant Marc J. Gabelli, CURED.[115951] [10-3628]

09/30/2010 26 ATTORNEY, Kathleen Nicholson Massey for Bruce Alpert, in case 10-3760 Kathleen Nicholson Massey for Bruce Alpert, in case 10-3628 Kathleen Nicholson Massey for Bruce Alpert, in case 10-3581 , [21], ADDED.[115954] [10-3581, 10-3628, 10-3760]

09/30/2010 27 FORM C, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3760, 10-3581, Appellee Bruce Alpert in 10-3628, FILED. Service date

09/30/2010 by email.[116254] [10-3760, 10-3581, 10-3628]

10/05/2010 31 NEW CASE MANAGER, Wilson Dudley, ASSIGNED.[119378] [10-3628]

11/11/2010 34 SCHEDULING NOTIFICATION, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, informing Court of proposed due date 01/14/2011, RECEIVED. Service date 11/11/2010 by email.[144497] [10-3581, 10-3628, 10-3760]

11/12/2010 36 SCHEDULING NOTIFICATION, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, informing Court of proposed due date 01/14/2011, RECEIVED. Service date 11/12/2010 by CM/ECF.[145249] [10-3581, 10-3628, 10-3760]

11/30/2010 38 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee-Cross-Appellant Marc J. Gabelli , FILED.[155184] [10-3628]

01/18/2011 39 NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED.

Service date 01/18/2011 by CM/ECF. [187720] [10-3581, 10-3628, 10-3760]

01/25/2011 40 SCHEDULING NOTIFICATION, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, 10-3628, 10-3760, informing Court of proposed due date 03/15/2011, RECEIVED. Service date 01/25/2011 by CM/ECF.[194157] [10-3581, 10-3628, 10-3760]

02/28/2011 41 MOTION, to extend time to 04/14/2011, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 02/28/2011 by CM/ECF. [220959] [10-3581, 10-3628, 10-3760]

02/28/2011 42 MOTION, to extend time to file Reply brief, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 02/28/2011 by CM/ECF. [221092] [10-3581, 10-3628, 10-3760]--[Edited 02/28/2011 by WD]

03/02/2011 43 MOTION ORDER, granting motion to extend time to file Reply brief filed by Appellee-Cross-Appellant Marc J. Gabelli and Bruce Alpert, [42], [41], FILED. [224040][43] [10-3581, 10-3628, 10-3760]

03/28/2011	46	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Mr. Dominick V. Freda for Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, 10-3628, 10-3760, FILED. Service date 03/28/2011 by CM/ECF. [246449] [10-3581, 10-3628, 10-3760]
03/29/2011	48	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Kathleen Nicholson Massey for Appellee-Cross-Appellant Bruce Alpert in 10-3581, Attorney Kathleen Nicholson Massey for Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 03/29/2011 by CM/ECF. [247822] [10-3581, 10-3628, 10-3760]
03/30/2011	51	CASE CALENDARING, for the week of 05/31/2011, PROPOSED.[249020] [10-3581, 10-3628, 10-3760]
03/31/2011	52	ATTORNEY, Katherine L. Wilson-Milne for Marc J. Gabelli, in case 10-3760 , [250004-2], ADDED.[250085] [10-3581, 10-3628, 10-3760]
04/15/2011	57	CASE CALENDARING, argument for 06/02/2011, SET.[264829] [10-3581, 10-3628, 10-3760]
04/19/2011	58	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. [267508] [10-3581, 10-3628, 10-3760]

06/01/2011	64	SUPPLEMENTAL BRIEF, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 06/01/2011 by CM/ECF.[303637] [10-3581, 10-3628, 10-3760]
06/02/2011	65	CASE, before DAL, DC, C.JJ., JSR, D.J., HEARD.[304584] [10-3581, 10-3628, 10-3760]
06/09/2011	66	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[310857] [10-3581, 10-3628, 10-3760]
06/09/2011	67	ARGUMENT CD, TRANSMITTED. [310858] [10-3581, 10-3628, 10-3760]
06/09/2011	68	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[311082] [10-3581, 10-3628, 10-3760]
06/09/2011	69	ARGUMENT CD, TRANSMITTED. [311085] [10-3581, 10-3628, 10-3760]
08/01/2011	74	NEW CASE MANAGER, Anna Greenidge, ASSIGNED.[352270] [10-3581, 10-3628, 10-3760]
08/01/2011	75	OPINION, dismissing the cross-appeals for want of appellate jurisdiction, by DAL, DC, RAKOFF, FILED.[352329] [10-3628, 10-3760]
08/01/2011	76	JUDGMENT, FILED.[353542] [10-3581, 10-3628, 10-3760]

08/04/2011	77	INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED.[356296] [10-3581, 10-3628, 10-3760]
09/19/2011	79	MOTION ORDER, granting motion to extend time to 10/14/2011 to file petition for rehearing/rehearing en banc [383660-2] filed by Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, by DC, FILED. [394399][79] [10-3581, 10-3628, 10-3760]
10/14/2011	80	PETITION FOR REHEARING /REHEARING EN BANC, on behalf of Appellee-Cross-Appellant Marc J. Gabelli, FILED. Service date 10/14/2011 by CM/ECF.[417526] [10-3628]
10/14/2011	84	LETTER, dated 10/14/2011, on behalf of Appellee Bruce Alpert, RECEIVED. Service date 10/14/2011 by CM/ECF.[418231] [10-3628]
11/22/2011	86	ORDER, PETITION FOR REHEARING/PETITION FOR REHEARING EN BANC DENIED, FILED.[454531] [10-3581, 10-3628, 10-3760]
11/28/2011	87	MOTION, to stay mandate, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service

date 11/28/2011 by CM/ECF. [457672] [10-3628, 10-3760]

11/30/2011 91 MOTION ORDER, granting motion to stay mandate [457667-2] filed by Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, granting motion to stay mandate [87] filed by Appellee-Cross-Appellant Marc J. Gabelli, in 10-3628, 10-3760, by DAL, DC, RAKOFF, FILED. [460136][91] [10-3581, 10-3628, 10-3760]

02/14/2012 92 U.S. SUPREME COURT NOTICE, granting Appellee-Cross-Appellant Bruce Alpert and Marc J. Gabelli in 10-3581, Appellee Bruce Alpert and Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli and Appellee-Cross-Appellant Bruce Alpert in 10-3760 extension to file Writ of Certiorari, FILED.[526826] [10-3581, 10-3628, 10-3760]

03/12/2012 93 U.S. SUPREME COURT NOTICE, granting Appellee-Cross-Appellant Bruce Alpert and Marc J. Gabelli in 10-3581, Appellee Bruce Alpert and Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli and Appellee-Cross-Appellant Bruce Alpert in 10-3760 extension to file Writ of Certiorari,

FILED.[549912] [10-3581, 10-3628, 10-3760]

04/26/2012 94 U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 04/24/2012, U.S. Supreme Court docket # 11-1274, RECEIVED. [591308] [10-3581, 10-3628, 10-3760]

09/28/2012 95 U.S. SUPREME COURT NOTICE, dated 09/25/2012, U.S. Supreme Court docket # 11-1274, stating the petition for writ of certiorari is granted, RECEIVED.[733510] [10-3581, 10-3628, 10-3760]

United States Court of Appeals
for the Second Circuit

10-3760

Securities and Exchange Commission v. Gabelli, et al.

09/20/2010	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellee-Cross-Appellant Bruce Alpert, FILED. [109713] [10-3760]
09/20/2010	2	PAYMENT OF DOCKETING FEE, on behalf of Appellee-Cross-Appellant Bruce Alpert, district court receipt # E 915355, FILED.[109718] [10-3760]
09/20/2010	3	ELECTRONIC INDEX, in lieu of record, FILED.[109720] [10-3760]
09/20/2010	4	DISTRICT COURT ORDER, dated 07/29/2010, RECEIVED.[109727] [10-3760]
09/21/2010	6	NOTE: See lead case, 10-3581, containing complete set of docket entries.[109729] [10-3760]
09/22/2010	9	SCHEDULING NOTIFICATION, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, informing Court of proposed due date 10/29/2010, RECEIVED. Service

		date 09/22/2010 by CM/ECF.[110722] [10-3581, 10-3628, 10-3760]
09/24/2010	10	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3628, 10-3760, FILED. Service date 09/24/2010 by CM/ECF. [112350] [10-3581, 10-3628, 10-3760]
09/24/2010	11	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee Marc J. Gabelli, FILED. Service date 09/24/2010 by CM/ECF.[112885] [10-3760]
09/29/2010	12	CAMP CONFERENCE ORDER: Type of Conference: Telephonic, Scheduled Date of Conference: 10/19/2010, Start Time: 3:00 PM, endorsed by Lisa J. Greenberg, FILED.[115191] [10-3581, 10-3628, 10-3760]
09/29/2010	13	CAMP CONFERENCE ORDER: Type of Conference: Amended Telephonic, Scheduled Date of Conference: 10/19/2010, Start Time: 3:00 PM, Conference Note: Correction of docket number on Order., endorsed by Lisa J.

Greenberg, FILED.[115194] [10-3581, 10-3628, 10-3760]

09/29/2010 14 NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email. [115909] [10-3581, 10-3628, 10-3760]

09/29/2010 15 FORM C, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email.[115911] [10-3581, 10-3628, 10-3760]

09/29/2010 16 FORM D, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 09/29/2010 by email.[115912] [10-3581, 10-3628, 10-3760]

09/30/2010 17 ATTORNEY, Kathleen Nicholson Massey for Bruce Alpert, in case 10-3760 Kathleen Nicholson Massey for Bruce Alpert, in case 10-3628 Kathleen Nicholson Massey for Bruce Alpert, in case 10-3581 , [14], ADDED.[115954] [10-3581, 10-3628, 10-3760]

09/30/2010 18 DEFECTIVE DOCUMENT, Form C, [15], on behalf of Appellee-Cross-

Appellant Bruce Alpert, FILED.[115957] [10-3760]

09/30/2010 19 FORM C, on behalf of Appellee Marc J. Gabelli, FILED. Service date 09/30/2010 by CM/ECF.[116167] [10-3760]

09/30/2010 20 FORM D, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 09/30/2010 by CM/ECF.[116174] [10-3581, 10-3760]

09/30/2010 21 FORM C, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3760, 10-3581, Appellee Bruce Alpert in 10-3628, FILED. Service date 09/30/2010 by email.[116254] [10-3760, 10-3581, 10-3628]

10/01/2010 22 DEFECTIVE DOCUMENT, Form C [18], on behalf of Appellee-Cross-Appellant Bruce Alpert, CURED.[117034] [10-3760]

10/05/2010 27 NEW CASE MANAGER, Wilson Dudley, ASSIGNED.[119383] [10-3760]

11/11/2010 30 SCHEDULING NOTIFICATION, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, informing Court of proposed due

date 01/14/2011, RECEIVED. Service date 11/11/2010 by email.[144497] [10-3581, 10-3628, 10-3760]

11/12/2010 32 SCHEDULING NOTIFICATION, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, informing Court of proposed due date 01/14/2011, RECEIVED. Service date 11/12/2010 by CM/ECF.[145249] [10-3581, 10-3628, 10-3760]

01/18/2011 34 NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 01/18/2011 by CM/ECF. [187720] [10-3581, 10-3628, 10-3760]

01/25/2011 35 SCHEDULING NOTIFICATION, on behalf of Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, 10-3628, 10-3760, informing Court of proposed due date 03/15/2011, RECEIVED. Service date 01/25/2011 by CM/ECF.[194157] [10-3581, 10-3628, 10-3760]

02/28/2011 36 MOTION, to extend time to 04/14/2011, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 02/28/2011 by CM/ECF. [220959] [10-3581, 10-3628, 10-3760]

02/28/2011 37 MOTION, to extend time to file Reply brief, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 02/28/2011 by CM/ECF. [221092] [10-3581, 10-3628, 10-3760]--[Edited 02/28/2011 by WD]

03/02/2011 38 MOTION ORDER, granting motion to extend time to file Reply brief filed by Appellee-Cross-Appellant Marc J. Gabelli and Bruce Alpert, [37], [36], FILED. [224040] [38] [10-3581, 10-3628, 10-3760]

03/28/2011 41 ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Mr. Dominick V. Freda for Appellant-Cross-Appellee Securities and Exchange Commission in 10-3581, 10-3628, 10-3760, FILED. Service date 03/28/2011 by CM/ECF. [246449] [10-3581, 10-3628, 10-3760]

03/29/2011 43 ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer

		Attorney Kathleen Nicholson Massey for Appellee-Cross-Appellant Bruce Alpert in 10-3581, Attorney Kathleen Nicholson Massey for Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 03/29/2011 by CM/ECF. [247822] [10-3581, 10-3628, 10-3760]
03/30/2011	46	CASE CALENDARING, for the week of 05/31/2011, PROPOSED. [249020] [10-3581, 10-3628, 10-3760]
03/31/2011	47	ATTORNEY, Katherine L. Wilson-Milne for Marc J. Gabelli, in case 10-3760 , [250004-2], ADDED.[250085] [10-3581, 10-3628, 10-3760]
04/15/2011	52	CASE CALENDARING, argument for 06/02/2011, SET.[264829] [10-3581, 10-3628, 10-3760]
04/19/2011	53	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. [267508] [10-3581, 10-3628, 10-3760]
06/01/2011	59	SUPPLEMENTAL BRIEF, on behalf of Appellee-Cross-Appellant Bruce Alpert in 10-3581, Appellee Bruce Alpert in 10-3628, 10-3760, FILED. Service date 06/01/2011 by CM/ECF.[303637] [10-3581, 10-3628, 10-3760]

06/02/2011	60	CASE, before DAL, DC, C.JJ., JSR, D.J., HEARD.[304584] [10-3581, 10-3628, 10-3760]
06/09/2011	61	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[310857] [10-3581, 10-3628, 10-3760]
06/09/2011	62	ARGUMENT CD, TRANSMITTED. [310858] [10-3581, 10-3628, 10-3760]
06/09/2011	63	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[311082] [10-3581, 10-3628, 10-3760]
06/09/2011	64	ARGUMENT CD, TRANSMITTED. [311085] [10-3581, 10-3628, 10-3760]
08/01/2011	69	NEW CASE MANAGER, Anna Greenidge, ASSIGNED.[352270] [10-3581, 10-3628, 10-3760]
08/01/2011	70	OPINION, dismissing the cross-appeals for want of appellate jurisdiction, by DAL, DC, RAKOFF, FILED.[352329] [10-3628, 10-3760]
08/01/2011	71	JUDGMENT, FILED.[353542] [10-3581, 10-3628, 10-3760]
08/04/2011	72	INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED.[356296] [10-3581, 10-3628, 10-3760]
09/19/2011	74	MOTION ORDER, granting motion to extend time to 10/14/2011 to file

petition for rehearing/rehearing en banc [383660-2] filed by Appellee-Cross-Appellant Marc J. Gabelli in 10-3581, by DC, FILED. [394399][74] [10-3581, 10-3628, 10-3760]

10/14/2011 75 PETITION FOR REHEARING/REHEARING EN BANC, on behalf of Appellee Marc J. Gabelli, FILED. Service date 10/14/2011 by CM/ECF.[417528] [10-3760]

10/14/2011 79 LETTER, dated 10/14/2011, on behalf of Appellee-Cross-Appellant Bruce Alpert, RECEIVED. Service date 10/14/2011 by CM/ECF.[418241] [10-3760]

11/22/2011 81 ORDER, PETITION FOR REHEARING/PETITION FOR REHEARING EN BANC DENIED, FILED.[454531] [10-3581, 10-3628, 10-3760]

11/28/2011 82 MOTION, to stay mandate, on behalf of Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli in 10-3760, FILED. Service date 11/28/2011 by CM/ECF. [457672] [10-3628, 10-3760]

11/30/2011 85 MOTION ORDER, granting motion to stay mandate [457667-2] filed by Appellee-Cross-Appellant Marc J.

Gabelli in 10-3581, granting motion to stay mandate [82] filed by Appellee-Cross-Appellant Marc J. Gabelli, in 10-3628, 10-3760, by DAL, DC, RAKOFF, FILED. [460136][85] [10-3581, 10-3628, 10-3760]

02/14/2012 86 U.S. SUPREME COURT NOTICE, granting Appellee-Cross-Appellant Bruce Alpert and Marc J. Gabelli in 10-3581, Appellee Bruce Alpert and Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli and Appellee-Cross-Appellant Bruce Alpert in 10-3760 extension to file Writ of Certiorari, FILED.[526826] [10-3581, 10-3628, 10-3760]

03/12/2012 87 U.S. SUPREME COURT NOTICE, granting Appellee-Cross-Appellant Bruce Alpert and Marc J. Gabelli in 10-3581, Appellee Bruce Alpert and Appellee-Cross-Appellant Marc J. Gabelli in 10-3628, Appellee Marc J. Gabelli and Appellee-Cross-Appellant Bruce Alpert in 10-3760 extension to file Writ of Certiorari, FILED.[549912] [10-3581, 10-3628, 10-3760]

04/26/2012 88 U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 04/24/2012, U.S. Supreme Court

docket # 11-1274, RECEIVED. [591308] [10-3581, 10-3628, 10-3760]

09/28/2012 89 U.S. SUPREME COURT NOTICE, dated 09/25/2012, U.S. Supreme Court docket # 11-1274, stating the petition for writ of certiorari is granted, RECEIVED.[733510] [10-3581, 10-3628, 10-3760]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ECF CASE

Civil Action No. 08 CIV 3868

DEMAND FOR JURY TRIAL

[Filed April 24, 2008]

SECURITIES AND EXCHANGE COMMISSION,	)
Plaintiff,	)
v.	)
MARC J. GABELLI, and BRUCE ALPERT,	)
Defendants.	)

COMPLAINT

Plaintiff Securities and Exchange Commission ("Commission") alleges the following against defendants Marc J. Gabelli and Bruce Alpert ("Defendants"):

SUMMARY

1. From 1999 to 2002, Marc Gabelli, the portfolio manager of the Gabelli Global Growth Fund ("GGGF"

or "the Fund"), authorized GGGF to be market timed, or "scalped," by Headstart Advisers Ltd. ("Headstart"), known during the relevant period as Folkes Asset Management. Starting in April 2000, Marc Gabelli authorized Headstart to significantly increase the amount of money it was using to market time GGGF in exchange for a "sticky asset" investment in a hedge fund he managed. Defendant Bruce Alpert, the Chief Operating Officer of Gabelli Funds (GGGF's adviser) and head of the market timing police, knew that Headstart was frequently trading in GGGF and allowed it to continue. After learning that Headstart had made a *quid pro quo* investment in exchange for its market timing capacity, Alpert approved the continuation of Headstart's timing.

2. By approving Headstart's market timing, defendants Marc Gabelli and Alpert knowingly or recklessly caused substantial harm to the Fund. The three accounts used by Headstart to market time GGGF during the relevant period earned internal rates of return of 185 percent, 160 percent, and 73 percent, respectively. Over the same period, the rate of return for long-term investors in GGGF was no more than negative 24.1 percent. The annual dilution caused by the market timing ranged from approximately one percent to four percent of GGGF's assets.[1]

3. From September 1999 to September 2002, Headstart executed 863 trades, or approximately 399 roundtrips, in GGGF with an aggregate dollar value of

---

[1] Dilution is a measure of the harm suffered by long-term investors due to market timing.

approximately $4.2 billion. From January 1, 2000 through June 30, 2002, Headstart's market-timing activity accounted for approximately 62 percent of the dollar value of all trading in GGGF.

4. At the same time that the Defendants were allowing Headstart to market time GGGF, Gabelli Funds, under Alpert's direction, was prohibiting other market timers from trading in GGGF based on language in GGGF's prospectus which gave the Fund the right to "reject any purchase order if, in the opinion of the Fund management, it is in the Fund['s] best interest to do so." In fact, Alpert made a presentation to the Fund's Board of Directors (the "Board"), in Marc Gabelli's presence, explaining that market timing was detrimental to mutual funds and describing how Gabelli Funds was taking steps to exclude market timers from the Fund. However, neither Alpert nor Marc Gabelli disclosed to the Board that Headstart was engaging in market-timing activity in GGGF. Indeed, neither Alpert nor Marc Gabelli disclosed to the Board, at that time or any other time during the relevant period, the market-timing arrangement with Headstart, the fact that Headstart's investment in Marc Gabelli's hedge fund was made in exchange for increased market-timing capacity, or the detrimental effects of Headstart's market timing on GGGF shareholders.

5. In September 2003, Alpert wrote a memorandum, which was placed on Gabelli Funds' parent company's website, in response to the New York Attorney General's public announcement of its market timing investigations. The memorandum was designed to assuage public investors' concerns that Gabelli Funds

might have a market-timing problem but failed to disclose material facts about Headstart, the sole authorized market timer in GGGF, and gave the misleading impression that any failure to exclude market timers was the result of procedural limitations rather than the intentional conduct of the Defendants.

6. By engaging in the conduct described in the Complaint, Defendants Marc Gabelli and Alpert aided and abetted violations of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"); and Defendant Alpert violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5.

7. Accordingly, the Commission seeks: (a) entry of permanent injunctions prohibiting the Defendants from further violations of the relevant provisions of the Advisers Act, the Securities Act, the Exchange Act and the rules promulgated thereunder; (b) disgorgement with prejudgment interest; (c) the imposition of a civil penalty against each Defendant due to the egregious nature of their violations; and (d) any other relief this Court deems necessary and appropriate under the circumstances.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to Sections 209 and 214 of the Advisers Act [15 U.S.C. §§ 80b-9, 80b-14]; Sections 20 and 22 of the Securities Act [15 U.S.C. §§ 77t, 77v]; and Sections 21 and 27 of the Exchange Act [15 U.S.C. §§ 78u, 78aa]. The Defendants, directly or indirectly, made use of the

means or instrumentalities of interstate commerce, or of the mails, or the facilities of a national securities exchange in connection with the transactions, acts, practices and courses of business alleged herein.

9. Venue is proper in this district pursuant to Section 214 of the Advisers Act [15 U.S.C. § 80b-14], Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)]; and Section 27 of the Exchange Act [15 U.S.C. § 78aa], because some of the alleged transactions, acts, practices, and courses of business occurred in the Southern District of New York.

DEFENDANTS

10. Marc J. Gabelli, 40, resides in Greenwich, Connecticut. He was the portfolio manager for GGGF and its predecessor fund from 1997 until early 2004 and was primarily responsible for the management of GGGF during the relevant period. He also managed several Gabelli-affiliated hedge funds. Since early 2004, Marc Gabelli has not had responsibility for GGGF and he ceased working for Gabelli Funds as of January 1, 2006. Marc Gabelli owns approximately 5 percent of the company that is the majority owner of Gabelli Funds' publicly-traded parent corporation. He is the son of the founder of the Gabelli complex of funds and is friends with Najy N. Nasser ("Nasser"), Headstart's Chief Investment Adviser. Marc Gabelli is currently the Chairman of the Board of a publicly-traded company.

11. Bruce Alpert, 56, resides in Westhampton Beach, New York. He has been the Chief Operating Officer of Gabelli Funds since 1988 and Gabelli Funds'

principal executive officer since 2003. During the relevant period, Alpert's principal responsibilities were operational and related to fund governance. Alpert received a CPA license from the state of New York in 1977.

RELATED PARTIES

12. Gabelli Funds LLC ("Gabelli Funds"), a New York limited liability company located in Rye, NY, is an investment adviser within the meaning of Section 2(a)(20) of the Investment Company Act and Section 202(a)(11) of the Investment Advisers Act. It is the investment adviser to GGGF.

13. GGGF is an open-end investment company registered under the Investment Company Act. Until January 13, 2000, GGGF's name was the Gabelli Global Interactive Couch Potato Fund. The Fund's name changed again on November 16, 2005 to GAMCO Global Growth Fund. During the relevant period, the Fund offered three classes of shares and invested primarily in common stocks of foreign and domestic issuers located in at least three countries. Its primary investment objective was to provide investors with appreciation of capital. During the relevant period, the Fund disclosed that it invested approximately 36 to 57 percent of its total assets in non-North American securities and had net assets ranging from approximately $100.2 million to $563 million.

STATEMENT OF FACTS

Background

14. A mutual fund is an investment company that pools money from many investors and invests those funds in stocks, bonds, short-term money market instruments, or other securities. Mutual fund investors purchase their shares directly from the fund itself or through a broker for the fund. Millions of Americans have chosen to invest in mutual funds as their primary method for saving for education, retirement, and other financial goals. Approximately half of all U.S. households own mutual fund shares.

15. Mutual funds are meant to be long-term investments and were primarily designed for buy-and-hold investors. Nevertheless, some investors attempt to trade in and out of mutual funds in order to exploit inefficiencies in the way funds value their shares. This strategy can be successful because many mutual funds use "stale" prices to calculate the value of the securities held in their portfolios. These prices are stale because they do not necessarily reflect the "fair value" of such securities at the time the shares are valued.

16. As a general rule, mutual funds are priced once a day, usually at 4:00 p.m. EST, when the New York Stock Exchange closes. The price, known as the Net Asset Value ("NAV"), generally reflects the closing prices of the securities that comprise a given fund's portfolio, plus the value of any cash that the fund manager maintains for the fund. Unlike stock, the price of a mutual fund does not change during the course of the day. Instead, a mutual fund always fills

the buy and sell orders it receives at the next available NAV. Accordingly, orders placed at any time during the trading day up to the 4:00 p.m. cutoff are executed at that day's NAV, but an order placed after the close of trading is executed at the next day's NAV.

17. Market-timing traders attempt to take advantage of mutual funds' pricing inefficiencies in a number of ways. One strategy is known as "time-zone arbitrage," a practice that takes advantage of stale pricing in mutual funds like GGGF that hold international stocks. For example, a U.S. mutual fund may hold shares of a Japanese company traded on the Tokyo Stock Exchange ("TSE"). Because of the time-zone difference, the TSE may close at 2:00 a.m. EST. If the U.S. mutual fund uses the TSE closing price for the Japanese company's stock to calculate the mutual fund's NAV at 4:00 p.m. EST, that fund's NAV will be based, at least partially, on market information that is fourteen hours old. Positive market movements during the New York trading day, which will later cause the Japanese market to rise when it opens at 8 p.m. EST, will not be incorporated into the fund's NAV, thereby causing the NAV to be artificially low. On such a day, a trader who buys the U.S. fund at the artificially low or "stale" price can realize a profit the next day by selling the U.S. fund's shares. Gabelli Funds has referred to the practice of time-zone arbitrage as "scalping."

18. Market timing has a negative effect on long-term mutual fund shareholders because it captures an arbitrage profit that comes dollar-for-dollar out of the pockets of the long-term mutual fund shareholders. Essentially, market timing allows the trader to step in

at the last moment and take part of the long-term shareholders' upside when the market goes up, so the next day's NAV is reduced for those shareholders who remain in the fund. If the trader sells on days when the market goes down, the arbitrage has the effect of making the next day's NAV lower than it would otherwise have been, thus magnifying the losses that long-term shareholders experience in a falling market.

19. Beyond profiting from inequitable transfer of wealth associated with market timing, market timers also harm mutual fund shareholders in a number of other ways. For example, because most market-timing purchases are followed by sales, or redemptions, the next business day or shortly thereafter, in order to lock in the gain from pricing inefficiencies, they impose additional transaction costs, such as trading commissions, on the long-term shareholders and can also force the mutual fund to keep excess cash on hand that would otherwise be more profitably invested. Moreover, trades necessitated by such short-term sales can cause the mutual fund to realize losses or taxable capital gains at undesirable times and increase the tax bill for long-term shareholders. Market-timing transactions may also force mutual fund managers to buy stock as it is going up in price or sell it into a falling market. In short, while market timers profit from engaging in frequent short-term trading of mutual fund shares, the costs associated with such trading are borne by unsuspecting long-term investors.

The Defendants' Market-Timing Agreement

20. In the summer of 1999, Marc Gabelli, GGGF's portfolio manager, met Nasser at a hedge fund

conference. Shortly thereafter, beginning in September 1999, Marc Gabelli authorized Headstart to market time GGGF. Initially, Headstart market timed GGGF using $5 million from two separate accounts and identified these accounts to a Gabelli Funds employee who notified Marc Gabelli. Sometime between September 1999 and April 2000, Alpert informed Nasser of the "ground rules" including that Headstart's trading would not be acceptable in any fund other than GGGF. The two also discussed the nature and frequency of Headstart's trading. By April 2000, Headstart's market-timing trades in GGGF had grown to over $7 million.

21. On April 7, 2000, Marc Gabelli agreed to permit Headstart to increase its timing capacity to $20 million, which was about four percent of GGGF's assets at that time, in exchange for a $1 million investment by Headstart in a hedge fund Marc Gabelli also managed. Headstart opened a separate account for the additional $13 million in timing capacity and notified Marc Gabelli that it had done so.

22. On April 17, 2000, Nasser emailed Marc Gabelli stating that he had organized the increase in market-timing capacity "which should be implemented on Monday [April 24]" and that he was "looking forward to doing something on [Marc Gabelli's] Hedge Fund especially in the spirit of cooperation which I think we have and are developing. I understand inflows would have a greater value for you businesswise now, near the beginning."

23. The following day, April 18, Nasser emailed Marc Gabelli informing him that Headstart anticipated

confirming its investment of approximately $1 million in the Marc Gabelli-managed hedge fund by Monday, April 24. On April 25, the day after the increase in Headstart's GGGF timing capacity to $20 million was to be implemented, Headstart notified Marc Gabelli that it had transferred $1 million for investment in the hedge fund. At that time, Headstart's investment in Marc Gabelli's hedge fund constituted approximately four percent of that hedge fund's assets.

24. From April 2000 until the spring of 2002, Headstart regularly market timed between $15 million and $20 million in GGGF. The three accounts Headstart used during that time comprised approximately four percent to 15 percent of the assets of GGGF.

25. On or around April 1, 2002, Alpert instructed Headstart to reduce its market-timing activity. Alpert reduced Headstart's timing because Headstart was trading in amounts that violated federal law. The following day, Marc Gabelli sent an email to Alpert: "WHAT IS THE SITUATION WITH MARKET TIMER – I UNDERSTAND YOU TOLD HIM "I SAID" IT WAS OK. . . . VERY PAROCHIAL AND DESTRUCTIVE." (emphasis and ellipsis in original). Alpert replied:

> I have always been opposed to the market timers in the fund. I had a discussion with Naji Nassar that he should reduce his market timing activity to no more than 3% of the fund. He was reluctant to do this except he reduced one account to 3% and still is using about 10% or $16 million. I would like him out completely. However, If he continues his participation in

other products of the firm we should allow some monies to remain in the Mutual funds.

26. Shortly after being instructed to reduce its market timing, Headstart redeemed a portion of its investment in Marc Gabelli's hedge fund. Marc Gabelli later explained in an email that the redemption occurred because Headstart "was reduced in mkt timing money in mutual funds."

27. Although Gabelli Funds reduced Headstart's market-timing capacity, Marc Gabelli and Alpert continued to allow Headstart to market time GGGF.

28. On August 7, 2002, the CEO of Gabelli Funds' parent company gave instructions to stop all market timers playing "the international game." Alpert informed Headstart the same day that it would be permitted no further purchases in GGGF, and that a new account that Headstart had set up would not be allowed to trade in GGGF. Shortly thereafter, Headstart redeemed its remaining investment in Marc Gabelli's hedge fund.

29. During the relevant period, Gabelli Funds received an advisory fee from GGGF, computed daily and paid monthly; at the annual rate of 1.00% of the Fund's average daily net assets. Gabelli Funds' affiliate also received management fees based on Headstart's investment in the Marc Gabelli-managed hedge fund.

The Adviser Banned Other Market Timers

30. In its prospectus, GGGF reserved the right to "reject any purchase order if, in the opinion of the Fund

management, it is in the Fund['s] best interest to do so." Beginning at least as early as December 2000, Gabelli Funds applied this provision to exclude identified market timers in GGGF and the other global funds, but continued to allow Headstart to market time GGGF.

31. On December 15, 2000, Alpert wrote an internal memo to the file which stated that "Market Timers (scalpers) have been using the International and Global Funds in a way that is disruptive to the Fund and the management of the portfolio. We are making efforts to identify each account and restrict them from purchasing the funds." Beginning about the same time, Alpert instructed two Gabelli Funds employees to review purchases in the global funds and reject purchases that appeared to be market timing. For the next two years, these employees acted as "market timing police," examining purchases that Alpert, Gabelli Funds' CFO, or a trading desk employee identified for review. If it appeared that the purchase was a timing trade or the account was involved in other market-timing activity, the purchase would be rejected or the account banned from making future purchases.

32. In a December 2000 email to Gabelli Funds' CFO, Marc Gabelli himself directed that a new market timer be banned from trading in GGGF. In doing so, he made clear that any timing allowed in GGGF would be "only what I authorized."

33. Although other market timers were restricted or banned, the two employees who monitored for market timers were specifically directed to leave Headstart's accounts alone because "it was a Marc Gabelli-client

relationship." At least one of the employees was given this instruction by Alpert.

34. When a purchase was rejected or an account banned, Gabelli Funds would send a letter to the broker whose customer originated the trade. A typical letter contained language stating that the purchase was being rejected or the customer banned for "market timing" activity and referred to the Fund's prospectus as the grounds for doing so. The letters also stated that market timing could harm the Fund: "Market timing can negatively affect the mutual fund investment process. Excessive and unpredictable trading hinders a fund manager's ability to pursue the fund's long-term goals. . . . We regret the need to place this restriction, but we feel it is in the best overall interest of the Fund's shareholders."

35. Gabelli Funds thus rejected market-timing purchases in at least twelve mutual funds totaling at least $58 million and also banned at least 150 accounts prior to August 31, 2002. During this same period, at least 48 accounts were banned from trading in GGGF and purchases totaling at least $23 million -- nearly half of the total value of rejected purchases -- were rejected from GGGF. The average size of a rejected purchase was approximately $279,000 and Gabelli Funds reviewed trades as small as $100,000. In contrast, Headstart was frequently trading in amounts up to $20 million in GGGF, but its trades were not blocked or reviewed. In fact, Alpert assured Nasser during this period that Headstart's accounts would not be blocked.

Misstatements Made to the GGGF Board of Directors

36. On February 21, 2001, Alpert attended a GGGF Board meeting and reported to the Board regarding "market timing" or "scalping" in global funds, its harm to the funds, and efforts Gabelli Funds was undertaking to combat it, in terms similar to those contained in his December 15, 2000 internal memorandum. However, Alpert did not disclose that Headstart was being permitted to market time GGGF.

37. Marc Gabelli attended the February 21, 2001 Board meeting. Immediately after Alpert's report on market timing, Marc Gabelli reported on the operations of GGGF. However, Marc Gabelli failed to disclose either Headstart's market-timing activity or the "sticky asset" arrangement.

38. Despite the representations to the Board about measures taken to restrict market timers and Gabelli Funds' *de facto* policy to reject market-timing purchases, Marc Gabelli and Alpert continued to allow Headstart's market timing while excluding other market timers from GGGF. In addition, neither Alpert nor Marc Gabelli disclosed to the Board, at that time or any other time during the relevant period, that Headstart was engaging in market-timing activity in GGGF, the market-timing arrangement with Headstart, the fact that Headstart's investment in the hedge fund Marc Gabelli managed was made in exchange for increased market-timing capacity, or the detrimental effects of Headstart's market timing on GGGF shareholders.

Market Timing Harmed GGGF and Its Shareholders

39. Headstart's internal rates of return on the three accounts it used to time GGGF from 2000 to 2002 were approximately 185 percent, 160 percent, and 73 percent, respectively. During the same time period, GGGF's rate of return – the rate of return realized by long-term investors – was at most negative 24.1 percent. Headstart's total profits from market timing were approximately $9.7 million.

40. From September 1999 to September 2002, Headstart executed 863 trades, or approximately 399 roundtrips, in GGGF with an aggregate volume of approximately $4.2 billion. From January 1, 2000 through June 30, 2002, its market-timing activity accounted for approximately 62 percent of the dollar value of all trading in GGGF.

41. On 115 separate days, GGGF's sale of shares to Headstart totaled more than three percent of GGGF's shares; on 83 of those days the sales totaled more than five percent, and on 11 of those days the sales exceeded ten percent of GGGF's shares. These excessive sales caused GGGF to violate federal securities laws. Marc Gabelli and Alpert knew, or were reckless in not knowing, that the large sales to Headstart were causing the Fund to violate the law, but nonetheless allowed them to continue.

42. Marc Gabelli and Alpert knew, or were reckless in not knowing, that GGGF was being harmed. Information on Headstart's and all other trading in GGGF was available to, and was in fact reviewed by,

Marc Gabelli and Alpert. Indeed, Marc Gabelli was specifically notified on at least two occasions that the "market timer" was "coming back into" or "entering" GGGF. Further, in July 2001, Alpert redeemed his personal holdings in GGGF, after telling a Gabelli officer that he intended to do so because Marc Gabelli was allowing GGGF to be scalped.

Alpert's Misleading Disclosures Regarding the Market Timing

43. On September 3, 2003, the New York Attorney General announced it was investigating market timing in mutual funds. This announcement led to a series of press releases by Gabelli Funds and an internal investigation.

44. In a memorandum dated September 3, 2003, addressed to the mutual fund directors and posted on Gabelli Funds' parent company's website on or around that date, Alpert wrote that a number of steps had been put in place to discourage "scalping," including that

> for more than two years, scalpers have been identified and restricted or banned from making further trades. Purchases from accounts with a history of frequent trades were rejected. Since August 2002, large transactions in the global, international and gold funds have been rejected without regard to the past history. While these procedures were in place they did not completely eliminate all timers.

45. Alpert knew, or was reckless in not knowing, that the statements contained in the September 3, 2003 memorandum were materially misleading. That memorandum made no mention of Headstart's trading – clearly known to and approved by Alpert – and misleadingly stated that scalpers had been restricted for more than two years. Moreover, the memorandum was misleading in that it created the false impression that Gabelli Funds was attempting to identify and ban all scalpers and frequent traders in its efforts to combat market timing in its funds. The release was designed to reassure investors and the Board that Gabelli Funds did not have market-timing problems similar to those being investigated by the New York Attorney General. However, it failed to disclose material facts about Headstart, the sole authorized market timer in GGGF, and gave the misleading impression that any failure to exclude market timers was the result of procedural limitations rather than the intentional conduct of the Defendants.

Defendants' Fraud Remained Concealed Until at Least Late 2003

46. The Commission did not discover the Defendants' illegal conduct until late 2003, at the earliest. The Commission could not have discovered that wrongdoing earlier because Defendants took affirmative acts to conceal it, and because of the self-concealing nature of Defendants' wrongdoing.

47. For example, Alpert's September 2003 memorandum to the mutual fund directors was designed to conceal Headstart's market timing and Defendants' wrongdoing from the Board and investors

and to reassure them that market timing was not a problem at Gabelli Funds. Further, Alpert, in Marc Gabelli's presence, told the GGGF Board that Gabelli Funds was taking measures to eliminate market timers, but Alpert omitted any disclosure of the fact that he and Marc Gabelli were allowing Headstart to continue market timing to the detriment of long-term investors. Lastly, Alpert specifically directed Gabelli Funds' "market-timing" police not to monitor Headstart's trading, effectively hiding the Defendants' wrongdoing.

FIRST CLAIM
Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder
(Against Bruce Alpert)

48. Paragraphs 1 through 47 are realleged and incorporated by reference as if set forth fully herein.

49. Defendant Alpert, by engaging in the conduct described above knowingly or recklessly, by the use of the means or instrumentalities of interstate commerce or of the mails, in connection with the purchase or sale of securities, directly or indirectly:

(a) employed devices, schemes or artifices to defraud;

(b) made untrue statements of material fact or omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made not misleading; or

(c) engaged in acts, practices or courses of business which operated or would have operated as a fraud or deceit upon any person.

50. By reason of the foregoing, defendant Alpert, directly or indirectly, violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

SECOND CLAIM
Violations of Section 17(a) of the Securities Act
(Against Bruce Alpert)

51. Paragraphs 1 through 47 are realleged and incorporated by reference as if set forth fully herein.

52. Defendant Alpert, by engaging in the conduct described above, knowingly, recklessly, or negligently in the offer or sale of securities, by the use of the means or instrumentalities of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) employed devices, schemes, or artifices to defraud;

(b) obtained money or property by means of untrue statements of material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) engaged in transactions, acts, practices or courses of business which operated or would have operated as a fraud or deceit upon the purchaser.

53. By reason of the foregoing, Alpert directly or indirectly violated and unless restrained and enjoined will continue to violate Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

THIRD CLAIM
Aiding and Abetting Violations of Sections 206(1) and 206(2) of the Investment Advisers Act
(Against Marc Gabelli and Bruce Alpert)

54. Paragraphs 1 through 47 are realleged and incorporated by reference as if set forth fully herein.

55. Gabelli Funds knowingly or recklessly, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly (a) employed devices, schemes, or artifices to defraud clients or prospective clients; and (b) engaged in transactions, practices, or courses of business which operated as a fraud or deceit upon clients or prospective clients, thereby violating Sections 206(1) and 206(2) of the Investment Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)].

56. Defendants Marc Gabelli and Bruce Alpert, and each of them, by engaging in the conduct described above, knowingly provided substantial assistance to Gabelli Funds' violations of Sections 206(1) and 206(2) of the Advisers Act.

57. By reason of the foregoing, defendants Marc Gabelli and Alpert aided and abetted, and unless restricted and enjoined, will continue to aid and abet violations of Sections 206(1) and 206(2) of the Investment Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)].

JURY DEMAND

58. The Commission hereby demands trial by jury on all claims so triable.

PRAYER FOR RELIEF

59. WHEREFORE, Plaintiff Securities and Exchange Commission respectfully requests that this Court enter a final judgment:

A. Enjoining Defendant Bruce Alpert and his respective agents, servants, employees, attorneys, assigns and all those persons in active concert or participation with him who receive actual notice of the injunction by personal service or otherwise, from directly or indirectly engaging in or aiding and abetting violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)]; and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

B. Enjoining Defendants Marc Gabelli and Bruce Alpert and their respective agents, servants, employees, attorneys, assigns and all those persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, from directly or indirectly aiding and

abetting violations of Sections 206(1) and 206(2) of the Investment Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)];

C. Ordering Defendants Marc Gabelli and Bruce Alpert to disgorge all ill-gotten gains from their illegal conduct together with prejudgment interest thereon;

D. Ordering Defendants Marc Gabelli and Bruce Alpert to pay civil monetary penalties pursuant to Section 209(e) of the Investment Advisers Act [15 U.S.C. § 80b-9(e)]; and, as to Defendant Alpert, Section 20(d) of the Securities Act [5 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. §78u(d)(3)]; and

E. Granting such other and further relief as this Court deems necessary and appropriate under the circumstances.

Respectfully Submitted,

/s/ Robert B. Blackburn
Robert B. Blackburn
(Local Counsel)
Securities and Exchange Commission
3 World Financial Center, Room 4300
New York, New York 10281-1022
(212) 336-1050
BlackburnR@sec.gov

/s/Mark Kreitman / Rs
Kevin P. O'Rourke
Christopher R. Conte
Mark Kreitman

Ivonia K. Slade
Jill S. Henderson
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-4010
(202) 551-4442 [ORourke]
(202) 772-9246 [Fax]
ORourkeK@sec.gov

Attorneys for Plaintiff

Dated: April 24, 2008

TOLLING AGREEMENT

WHEREAS, the Division of Enforcement (the "Division") of the United States Securities and Exchange Commission (the "Commission") is conducting an investigation entitled In the Matter of Certain Mutual Fund Trading Practices, NY-07220 to determine whether there have been violations of certain provisions of the federal securities laws; and

WHEREAS, the Division is continuing its Investigation and while it has issued Marc Gabelli a Wells notice stating the Division intends to recommend civil and/or administrative proceedings (the "Proceedings") be instituted against Marc Gabelli, the Division desires sufficient time to consider the arguments made in Marc Gabelli's Wells response; and

WHEREAS, the Division and Marc Gabelli desire to address the continuing passage of time affecting any potential statute of limitations applicable to the Proceedings;

ACCORDINGLY, IT IS HEREBY AGREED by and between the Division and Marc Gabelli that:

1. any statute of limitations applicable to the Proceedings that has not expired as of August 1, 2007 is interrupted, suspended, and deemed to have been tolled for the period beginning on August 1, 2007, and ending at midnight on October 1, 2007 (the "Tolling Period");

2. nothing in this agreement shall be construed as an admission by the Commission, Division, or

Marc Gabelli, relating to the applicability of any statute of limitations to the Proceedings, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply;

3. Marc Gabelli will exclude the Tolling Period in calculating the Commission's compliance with a statute of limitations if and when Marc Gabelli asserts any statute of limitations as a defense to the Proceedings, or as a reason to avoid or reduce any sanctions or relief being sought;

4. nothing in this agreement shall be construed as an allegation by the Division of any wrongdoing by Marc Gabelli, or as an admission of any wrongdoing by Marc Gabelli; and

This instrument contains the entire agreement of the parties on the subject of a potentially applicable statute of limitations and may not be changed orally, but only by an agreement in writing.

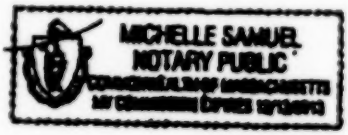
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By: /s/ Mark Kreitman Date: 6/21/07
Mark Kreitman, Esq.
ASSISTANT DIRECTOR

By: /s/ Marc Gabelli Date: 6/28/07
Marc Gabelli

On June 28, 2007, there personally appeared before me Marc Gabelli, known to me to be the person who executed the foregoing Tolling Agreement.

/s/M. Samuel
Notary Public
Commission expires:



Approved as to Form:

/s/Lewis J. Liman 7/2/07
Lewis J. Liman
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006

Counsel to Marc Gabelli

AMENDMENT TO TOLLING AGREEMENT

IT IS HEREBY STIPULATED AND AGREED by and between the Division of Enforcement of the Securities and Exchange Commission (the "Commission") and Marc Gabelli, for their mutual benefit, that the tolling agreement executed by Marc Gabelli on June 28, 2007, approved as to form by Lewis J. Liman, Esq. on July 2, 2007, and executed by the Commission on June 21, 2007, is amended as follows:

1. the ending date for the tolling period referenced in the first sentence of paragraph one (1) of the tolling agreement is hereby extended to midnight, November 30, 2007;

2. all other terms and conditions of the tolling agreement remain unchanged.

This instrument and the tolling agreement document that it amends contain the entire agreement of the parties and may not be changed orally, but only by an agreement in writing.

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By: /s/ Mark Kreitman 2007/9/27 Date: _____
Mark Kreitman, Esq.
ASSISTANT DIRECTOR

By: /s/ Marc Gabelli _____ Date: 26/9/07
Marc Gabelli

On September 26, 2007, there personally appeared before me Marc Gabelli, known to me to be the person who executed the foregoing Amendment to Tolling Agreement.

/s/M. Samuel

Notary Public

Commission expires:

Approved as to Form:

/s/Lewis J. Liman
Lewis J. Liman, Esq.
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006

Counsel to Marc Gabelli

TOLLING AGREEMENT

WHEREAS, the Division of Enforcement (the "Division") of the United States Securities and Exchange Commission (the "Commission") is conducting an investigation entitled In the Matter of Certain Mutual Fund Trading Practices, NY-07220 to determine whether there have been violations of certain provisions of the federal securities laws; and

WHEREAS, the Division is continuing its Investigation and while it has issued Bruce Alpert a Wells notice stating the Division intends to recommend civil and/or administrative proceedings (the "Proceedings") be instituted against Bruce Alpert, the Division desires sufficient time to allow Bruce Alpert to reply to the Wells notice and consider his arguments; and

WHEREAS, the Division and Bruce Alpert desire to address the continuing passage of time affecting any potential statute of limitations applicable to the Proceedings;

ACCORDINGLY, IT IS HEREBY AGREED by and between the Division and Bruce Alpert that:

1. any statute of limitations applicable to the Proceedings is interrupted, suspended, and deemed to have been tolled until midnight October 7, 2007 (the "Tolling Period");

2. nothing in this agreement shall be construed as an admission by the Commission, Division, or Bruce Alpert, relating to the applicability of any

statute of limitations to the Proceedings, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply;

3. nothing in this agreement shall be construed as an allegation by the Division of any wrongdoing by Bruce Alpert, or as an admission of any wrongdoing by Bruce Alpert; and

This instrument contains the entire agreement of the parties on the subject of a potentially applicable statute of limitations and may not be changed orally, but only by an agreement in writing.

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By: /s/ Mark Kreitman Date: 5/4/07
Mark Kreitman, Esq.
ASSISTANT DIRECTOR

By: /s/ Edward G. McDonald Date: 5/2/07

AMENDMENT TO TOLLING AGREEMENT

IT IS HEREBY STIPULATED AND AGREED by and between the Division of Enforcement of the Securities and Exchange Commission (the "Commission") and Bruce Alpert, for their mutual benefit, that the tolling agreement executed by Edward A. McDonald, Esq. on behalf of Mr. Alpert on May 2, 2007, and by the Commission on May 4, 2007, is amended as follows:

1. the ending date for the tolling period referenced in the first sentence of paragraph one (1) of the tolling agreement is hereby extended to midnight, December 7, 2007;

2. all other terms and conditions of the tolling agreement remain unchanged.

This instrument and the tolling agreement document that it amends contain the entire agreement of the parties and may not be changed orally, but only by an agreement in writing.

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By: /s/ Mark Kreitman Date: 9/14/07
Mark Kreitman, Esq.
ASSISTANT DIRECTOR

By: /s/ Bruce Alpert Date: 9/14/07
Bruce Alpert

On September 14, 2007, there personally appeared before me Bruce Alpert, known to me to be the person who executed the foregoing Amendment to Tolling Agreement.

Christina G. Retacco

Notary Public

Commission expires:

CHRISTINA G. RETACCO
Notary Public, State of New York
No. 01RES187164
Certified in Westchester County
Term Expires May 29, 2011

Approved as to Form:

/s/Edward A. McDonald, Esq.
Edward A. McDonald, Esq.
Dechert LLP
30 Rockefeller Plaza
New York, NY 10012

Counsel to Bruce Alpert

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

08 Civ. 3868 (DAB)

[Filed July 29, 2010]

SECURITIES AND EXCHANGE COMMISSION	)
Plaintiff,	)
-against-	)
MARC J. GABELLI and BRUCE ALPERT,	)
Defendants.	)

ORDER

DEBORAH A. BATTS, United States District Judge.

Plaintiff moves pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure to dismiss, without prejudice, the remaining disgorgement remedy under the Investment Advisers Act of 1940, against Defendants Gabelli and Alpert. Plaintiff represents that it will reassert that remedy "if, but only if, plaintiff successfully obtains a reversal on appeal of any claim or remedy dismissed by the Court" in its March 17, 2010 Memorandum and Order, granting in part, and denying in part, Defendants' Motions to Dismiss. (Plt's Mem. Of Law, 2.)

Here, the Court finds that such a dismissal would conserve the resources of the Court and the parties, would not substantially prejudice the Defendants, and would meet the factors set forth in Zagano v. Fordham University, 900 F.2d 12, 14 (2d Cir. 1990) ("Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any undue vexatiousness on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss.") (internal citations omitted).

Accordingly, Plaintiff's remaining remedy of disgorgement under the Investment Advisers Act of 1940 is DISMISSED without prejudice to refiling only if it obtains a reversal on appeal of any claim or remedy dismissed by the Court in its March 17, 2010 Memorandum and Order.

SO ORDERED.

Dated: New York, New York

July 28, 2010

/s/Deborah A. Batts
Deborah A. Batts
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

08 CV 3868 (DAB)

[Filed August 17, 2010]

SECURITIES AND EXCHANGE COMMISSION	)
Plaintiff,	)
v.	)
MARC J. GABELLI, and BRUCE ALPERT,	)
Defendants.	)

ORDER ENTERING FINAL JUDGMENT

WHEREAS, there is no remaining issue or remedy for trial as a result of the Court's Memoranda and Orders of March 17, 2010 and July 28, 2010;

IT IS THEREFORE ORDERED that:

1. Final judgment in this matter is entered; and

2. Each party to this action shall bear its own costs, disbursements, attorneys' fees, and expenses.

SO ORDERED.

/s/Deborah A. Batts
8/17/10 U.S. District Court

PETITIONER'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 9 - 2012
OFFICE OF THE CLERK

No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' BRIEF ON THE MERITS

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
Alida Y. Lasker
Katherine L. Wilson-Milne
Jared M. Gerber
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500
kathleen.massey@dechert.com

Counsel for Petitioners

November 9, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

QUESTION PRESENTED

Section 2462 of Title 28 of the United States Code provides that "except as otherwise provided by Act of Congress" any penalty action brought by the government must be "commenced within five years from the date when the claims *first accrued*." 28 U.S.C. § 2462 (emphasis added). This Court has explained that "[i]n common parlance a right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954).

Where Congress has not enacted a separate controlling provision, does the government's claim first accrue for purposes of applying the five-year limitations period under 28 U.S.C. § 2462 when the government can first bring an action for a penalty?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. THE PLAIN LANGUAGE OF SECTION 2462 PROHIBITS A COURT FROM ENTERTAINING A PENALTY ACTION MORE THAN FIVE YEARS AFTER THE CLAIM ACCRUED 11

A. A Claim Accrues When The Factual And Legal Prerequisites For Bringing Suit Are In Place 11

B. The Structure Of Section 2462 Reflects Congress's Intent That Courts Not Entertain Penalty Actions Unless Commenced Within Five Years Of

The Date The Government First Had The Right To Sue 16

II. CONGRESS KNEW HOW TO DRAFT A DISCOVERY RULE AND DID NOT IN SECTION 2462 18

III. THE DECISION BELOW IS INCONSISTENT WITH THE DISCOVERY RULE 25

A. This Case Does Not Involve The Doctrine Of Fraudulent Concealment Or Equitable Tolling 25

B. The Discovery Rule Is Not Applicable 29

C. The Presumption Against Perpetual Penalties Applies 34

D. Reading A Discovery Rule Into Section 2462 Would Violate The Core Objectives Of Statutes Of Limitations And The Separation Of Powers 37

1. The Second Circuit's Discovery Rule Conflicts With The Purposes Of Statutes Of Limitations 37

2. The Second Circuit's Rule Is Unworkable 43

3. The Second Circuit's Discovery Rule Conflicts With The Separation of Powers 46

IV. SECTION 2462'S HISTORY DOES NOT SUPPORT THE GOVERNMENT'S CLAIM 49

CONCLUSION 54

TABLE OF AUTHORITIES

Page(s)

Cases:

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) ..... *passim*

Aaron v. SEC,
446 U.S. 680 (1980) 48

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 35, 36

Affiliated Ute Citizens v. United States,
406 U.S. 128 (1972) 48

Agency Holding Corp. v. Malley-Duff Assocs., Inc.
483 U.S. 143 (1987) 42

Alabama v. Bozeman,
533 U.S. 146 (2001) 18

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) 26

Bailey v. Glover,
88 U.S. 342 (1874) 25, 26, 27, 28

Bank of the U.S. v. Daniel,
37 U.S. (12 Pet.) 32 (1838) 51

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 48

Bricker v. Lightner,
40 Pa. 199 (1861) 33

Bruesewitz v. Wyeth LLC,
131 S. Ct. 1068 (2011) 32

Callis v. Waddy,
16 Va. (2 Munf.) 511 (1811) 32

Campbell v. Haverhill,
155 U.S. 610 (1895) 38

Cent. Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) ..... *passim*

Cocke v. McGinnis,
8 Tenn. 361 (1828) 32

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980) 11

Credit Suisse Sec. (USA) LLC v. Simmonds,
132 S. Ct. 1414 (2012) 26, 37

Crown Coat Front Co. v. United States,
386 U.S. 503 (1967) 12

Dep't of Hous. & Urban Dev. v. Rucker,
535 U.S. 125 (2002) 13

Dodd v. United States,
545 U.S. 353 (2005) 11

Evans v. Gee,
36 U.S. (11 Pet.) 80 (1837) 51

Exploration Co. v. United States,
247 U.S. 435 (1918) 28

First Mass. Tpk. Corp. v. Field,
3 Mass. 201 (1807) 33

Forest Grove Sch. Dist. v. T.A.,
557 U.S. 230 (2009) 52

Grunewald v. United States,
353 U.S. 391 (1957) 38

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 51

Hamilton v. Shepperd,
7 N.C. (3 Mur.) 115 (1819) 32

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 48

Hickman v. Taylor,
329 U.S. 495 (1947) 45

Holland v. Florida,
130 S. Ct. 2549 (2010) 26

Holmberg v. Armbrecht,
327 U.S. 392 (1946) . . . . . *passim*

In re City of New York,
607 F.3d 923 (2d Cir. 2010) 45

In re Cnty. of Erie,
473 F.3d 413 (2d Cir. 2007) 45

Int'l Union v. Hoosier Cardinal Corp.,
383 U.S. 696 (1966) 26

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 26

Kahn v. Kohlberg, Kravis, Roberts & Co.,
970 F.2d 1030 (2d Cir. 1992) 16

Kane v. Cook,
8 Cal. 449 (1857) 33

Klehr v. A.O. Smith Corp.,
521 U.S. 179 (1997) 26, 37, 42

Krulewitch v. United States,
336 U.S. 440 (1949) 38

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 26, 28

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 18

Meeker v. Lehigh Valley R.R. Co.,
236 U.S. 412 (1915) 34

Merck & Co. v. Reynolds,
130 S. Ct. 1784 (2010) 29, 30, 32

Meredith v. United States,
38 U.S. (13 Pet.) 486 (1839) 51

Montgomery v. Hernandez,
25 U.S. (12 Wheat.) 129 (1827) 50

N. Star Steel Co. v. Thomas,
515 U.S. 29 (1995) 32

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975) 45

Order of R.R. Telegraphers v. Ry. Express Agency,
321 U.S. 342 (1944) 42

Pinter v. Dahl,
486 U.S. 622 (1988) 18, 48

Pyle v. Beckwith,
24 Ky. (1 J.J. Marsh.) 445 (1829) 32

Raygor v. Regents of the Univ. of Minn.,
534 U.S. 533 (2002) 26

Reading Co. v. Koons,
271 U.S. 58 (1926) 12, 13, 53

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 17, 21

Rotella v. Wood,
528 U.S. 549 (2000) 26, 30, 37, 38

SafeCard Servs., Inc. v. SEC,
926 F.2d 1197 (D.C. Cir. 1991) 45

SEC v. Blavin,
760 F.2d 706 (6th Cir. 1985) 16

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963) 16, 31, 48

SEC v. Jones,
476 F. Supp. 2d 374 (S.D.N.Y. 2007) 16

SEC v. Koenig,
557 F.3d 736 (7th Cir. 2009) 53

SEC v. Obus,
693 F.3d 276 (2d Cir. 2012) 31, 34

SEC v. Zandford,
535 U.S. 813 (2002) 48

Smith v. Bishop,
9 Vt. 110 (1837) 32

Smith v. United States,
143 F.2d 228 (9th Cir. 1944) 51, 52

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 48

Taylor v. Freeland & Kronz,
503 U.S. 638 (1992) 26

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 18

Toussie v. United States,
397 U.S. 112 (1970) 17

Traer v. Clews,
115 U.S. 528 (1885) 26

Troup v. Smith,
20 Johns. 33 (N.Y. 1822) 32

TRW Inc. v. Andrews,
534 U.S. 19 (2001) . . . . . *passim*

Tull v. United States,
481 U.S. 412 (1987) 34

Unexcelled Chem. Corp. v. United States,
345 U.S. 59 (1953) 12

United States v. Lindsay,
346 U.S. 568 (1954) 13

United States v. Maillard,
26 F. Cas. 1140 (S.D.N.Y. 1871) 51, 52

United States v. Mayo,
26 F. Cas. 1230 (C.C.D. Mass. 1813) 36

United States v. Morton Salt Co.,
338 U.S. 632 (1950) 40

Wallace v. Kato,
549 U.S. 384 (2007) 13

Wayte v. United States,
470 U.S. 598 (1985) 46

Wilcox v. Plummer,
29 U.S. (4 Pet.) 172 (1830) 51

Wilder v. Va. Hosp. Ass'n,
496 U.S. 498 (1990) 48

Wood v. Carpenter,
101 U.S. 135 (1879) 39

Young v. United States,
535 U.S. 43 (2002) 26

Statutes and Regulations:

Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112 50

Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627 50

Act of Feb. 28, 1839, ch. 36, § 3, 5 Stat. 321 50

Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 321 50

Act of June 25, 1948, Pub. L. No. 80-7773, 61 Stat. 869, *codified at* 28 U.S.C. § 2462 52

Revised Statutes § 1047, 18 Stat. 193 (1874) 52

2 U.S.C. § 179r(b)(2) 47

2 U.S.C. § 1703(e)(2)(B) 47

7 U.S.C. § 9(10)(c)(ii) 47

7 U.S.C. § 13a 47

7 U.S.C. § 13a-1 47

7 U.S.C. § 7734(b) 47

12 U.S.C. § 1782(e) 24

12 U.S.C. § 1817(g) 22

15 U.S.C. § 77e(a) 48

15 U.S.C. § 77k 48

15 U.S.C. § 77m 23

15 U.S.C. § 77q(a) 48

15 U.S.C. § 77s(c) 40

15 U.S.C. § 77t(d) 47

15 U.S.C. § 77www(a) 22

15 U.S.C. § 78i(f) 23

15 U.S.C. § 78j 48

15 U.S.C. § 78m(b)(2)(A) 47

15 U.S.C. § 78n(e) 48

15 U.S.C. § 78p(a) 48

15 U.S.C. § 78q(a) 40

15 U.S.C. § 78q(b) 40

15 U.S.C. § 78r 22

15 U.S.C. § 78u(a) 40

15 U.S.C. § 78u(b) 40

15 U.S.C. § 78u(d)(3) 47

15 U.S.C. § 80a-35(a) 48

15 U.S.C. § 80b-4 40

15 U.S.C. § 80b-6 ..... 2, 31, 34, 48

15 U.S.C. § 80b-6(1) 4

15 U.S.C. § 80b-6(2) 4

15 U.S.C. § 80b-9(b) 40

15 U.S.C. § 80b-9(e)(1) 15, 31

15 U.S.C. § 80b-9(e)(2) 35

15 U.S.C. § 80b-9(e)(3)(C) 34

19 U.S.C. ch. 4 43

19 U.S.C. § 1592(c)(1) 21

19 U.S.C. § 1593a(c)(1) 21

19 U.S.C. § 1621 43

19 U.S.C. § 1621(1) 20

19 U.S.C. § 1641(d)(4) 21

21 U.S.C. § 335b(a)(1) 21

21 U.S.C. § 335(b)(3) 21

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1658 29

28 U.S.C. § 1658(b) 23, 42

28 U.S.C. § 2401 12

28 U.S.C. § 2409a(g) 24

28 U.S.C. § 2415 . . . . . 19, 20, 43

28 U.S.C. § 2415(a) 19

28 U.S.C. § 2415(b) 19, 20

28 U.S.C. § 2415(d) 24

28 U.S.C. § 2416 . . . . . *passim*

28 U.S.C. § 2416(c) 19

28 U.S.C. § 2501 13

28 U.S.C. § 2462 . . . . . *passim*

31 U.S.C. § 3729 . . . . . 21, 43

31 U.S.C. § 3729(a)(1) 21

31 U.S.C. § 3730 ..... 21, 43

31 U.S.C. § 3730(a) 21

31 U.S.C. § 3731 43

31 U.S.C. § 3731(b) 21

31 U.S.C. § 3732 43

31 U.S.C. § 3733 43

42 U.S.C. § 1395nn(g) 47

Ariz. Rev. Stat. § 12-543(3) 24

Cal. Civ. Proc. Code § 338(d) 24

Idaho Code Ann. § 5-218 24

Iowa Code § 614.4 24

Kan. Stat. Ann. § 60-513(a)(3) 24

Md. Code Ann. § 5-203 24

Minn. Stat. Ann. § 541.05(6) 24

Miss. Code § 15-1-67 24

Mo. Rev. Stat. § 516.120(5) 24

Mont. Code Ann. § 27-2-203 24

N.C. Gen. Stat. § 1-52(9) 24

N.D. Cent. Code § 28-01-16(6) 24

N.M. Stat. Ann. § 37-1-7 24

Neb. Rev. Stat. § 25-207 24

Nev. Rev. Stat. § 11.190(3)(d) 24

Okla. Stat. tit. 12, § 95(3) 24

S.D. Codified Laws § 15-2-3 24

Wash. Rev. Code § 4.16.080(4) 24

Wis. Stat. § 893.93(1)(b) 24

Wyo. Stat. Ann. § 1-3-106 24

17 C.F.R. § 201.1004 35

17 C.F.R. § 202.5 40

17 C.F.R. § 202.5(c) 3

17 C.F.R. § 275.204-2(e)(1) 40

17 C.F.R. § 275.204-2(e)(2) 40

Other Authorities:

2 Calvin W. Corman, *Limitations of Actions* § 9.7.1 (1991) 27

31 Eliz. c. 5, § 5 (1588) 35

112 Cong. Rec. 14378 (1966) 20

Alexander M. Burrill, *A New Law Dictionary and Glossary* (1850) 14

American and English Encyclopaedia of Law (John H. Merrill ed. 1887) 14

The American Heritage Dictionary (3d ed. 1994) . . 15

Black's Law Dictionary (2d ed. 1910) 15

Black's Law Dictionary (9th ed. 2009) 15, 23

Brief of the SEC, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581) 6, 27

Brief for the United States, *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (No. 01-455), 2002 WL 471831 13

Charles Richardson, *A New Dictionary of the English Language* (1839) 14

Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, SEC Release No. 33-8408, IC-26418, 69 F. Reg. 22303, 2004 WL 865628 (Apr. 23, 2004) 41

Exemptive Rule Amendments of 2004: The Independent Chair Condition (Apr. 2005), *available at* http://www.sec.gov/news/studies/indchair.pdf. 2

H.G. Wood, *A Treatise on the Limitations of Actions at Law and in Equity* (1893) 26

H.R. Report No. 89-1534 (1966) 19, 20

Improvement of Procedures in Claims Settlement and Government Litigation: Hearing on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before the H. Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) 20, 39

J.B.G., Annotation, *When statutes of limitations commences to run against action to recover, or for conversion of, property stolen or otherwise wrongfully taken*, 136 A.L.R. 658 (1942) 32

James A. Ballentine, *The College Law Dictionary* (2d. ed. 1948) 15

John Bouvier, *A Law Dictionary* (5th ed. 1855) . . . 14

John Bouvier, *Bouvier's Law Dictionary* (1897) . . . 14

John Bouvier, *Bouvier's Law Dictionary* (William E. Baldwin ed., 1948) 15

John Francis Kelly, *A Treatise On The Code Limitations of Actions Under All State Codes* (1903) 32, 51

Joint Appendix, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581) 4

Mark T. Roche, Sean C. Adams & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations? SEC v. Gabelli*, BNA Securities Regulation & Law Report, July 23, 2012 42

Merriam-Webster.com 15

Noah Webster, *An American Dictionary of the English Language* (1828) 14

Office of Chief Counsel, Securities and Exchange Commission, *Enforcement Manual* (March 9, 2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf 40

Random House Compact Unabridged Dictionary (spec. 2d ed. 1996) 15

Release No. 34-21633, IC-14299, 32 SEC Docket 170, 1985 WL 58871 (Jan. 4, 1985) 41

Restatement (Second) of Torts § 525 (1965) 31

Restatement (Second) of Torts § 550 (1965) 31

S. Rep. No. 1328 (1966) 20

SEC Form N-1A, Item 11(e), *available at* http://www.sec.gov/about/forms/formn-1a.pdf . 41

SEC Form N-SAR, Item 28, *available at*: http://www.sec.gov/about/forms/formn-sar.pdf . 41

SEC Press Release Archives for 2003, http://www.sec.gov/news/press/pressarchive/2003press.shtml 3

SEC Press Release Archives for 2004, http://www.sec.gov/news/press/pressarchive/2004press.shtml 3

Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the U.S. Securities Laws (Sept. 19, 1998), *available at* http://sec.gov/news/speech/speecharchive/1998/spch222.htm 35

Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* (1888) 14

Transcript of Oral Argument, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581) 6, 27

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 653 F.3d 49. The opinion of the district court (Pet. App. 26a) is unreported.

JURISDICTION

The decision of the court of appeals was issued on August 1, 2011. A petition for rehearing and rehearing en banc was denied on November 22, 2011. Pet. App. 52a. On February 10, 2012, and March 7, 2012, Justice Ginsburg extended the time within which to file the petition for a writ of certiorari to and including April 20, 2012. The petition for a writ of certiorari was filed on that date, and was granted on September 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2462 of Title 28 of the United States Code provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT OF THE CASE

1. In the Fall of 2003, the Securities and Exchange Commission ("SEC") began an investigation of Gabelli Funds, LLC ("Gabelli Funds"), a registered investment adviser under the Investment Advisers Act ("IAA" or the "Act"), 15 U.S.C. § 80b-6, focusing on trading the SEC characterized as market timing that took place between 1999 and 2002 in the Gabelli Global Growth Fund ("GGGF" or "the Fund"), one of the several funds Gabelli Funds managed. J.A. 72-73, 89.[1] Among others, the investigation involved the portfolio manager for GGGF, Marc J. Gabelli,[2] and Gabelli Funds' Chief Operating Officer, Bruce N. Alpert. J.A. 76-77. The investigation followed the announcement, on September 3, 2003, that the New York Attorney General was conducting an investigation into "market timing" in the mutual fund industry. J.A. 88. *See Exemptive Rule Amendments of 2004: The Independent Chair Condition* (Apr. 2005), http://www.sec.gov/news/studies/indchair.pdf (describing the SEC's investigation of and recovery related to market timing

---

[1] Market timing "refers to (i) frequent buying and selling of shares in the same mutual fund and (ii) buying and selling mutual fund shares to exploit pricing inefficiencies." *Exemptive Rule Amendments of 2004: The Independent Chair Condition* 32 (Apr. 2005), http://www.sec.gov/news/studies/indchair.pdf. The complaint alleged that Gabelli Funds permitted "time zone arbitrage" or "scalping," in which traders try to exploit the difference in closing times between foreign and U.S. markets. J.A. 79. Petitioners deny that allegation.

[2] Petitioner Gabelli is the son of the founder of the Gabelli complex of funds, but is not alleged to have been an officer of, or had any executive or management position with, Gabelli Funds. J.A. 76.

scandals beginning in 2003 as a result of the New York Attorney General investigation). The SEC concluded a number of similar investigations in 2003 and 2004, during the period it conducted the investigation here. *See* SEC Press Release Archives for 2003 and 2004, http://www.sec.gov/news/press/pressarchive/2003press.shtml; http://www.sec.gov/news/press/pressarchive/2004press.shtml. For reasons known only to the SEC, the SEC let this investigation languish. J.A. 89.

In the Spring of 2007, the SEC asked petitioners to enter into tolling agreements to suspend the applicable statutes of limitations. The tolling agreements recited that the SEC Division of Enforcement "ha[d] issued [] Wells notice[s][3] stating the Division intends to recommend civil and/or administrative proceedings" against each of the petitioners but "desire[d] sufficient time to consider the arguments" in submissions petitioners made to the SEC. *See* J.A. 96, 101. On May 4, 2007, Alpert entered into a tolling agreement suspending any statute of limitations until October 7, 2007, which he later agreed to extend to December 7, 2007. J.A. 101-04. On June 28, 2007, Gabelli executed a tolling agreement that suspended any statute of limitations to October 1, 2007, which he later agreed to extend to November 30, 2007. J.A. 96-100.

---

[3] A Wells Notice is the means by which the SEC staff advises subjects of an existing investigation "of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding." 17 C.F.R. § 202.5(c).

2. On April 24, 2008, long after the tolling agreements expired, the SEC filed a civil complaint in the United States District Court for the Southern District of New York against petitioners.[4] J.A. 72. The complaint asserted claims against Gabelli and Alpert under Sections 206(1) and 206(2) of the IAA, 15 U.S.C. § 80b-6(1) & (2).[5] J.A. 75. As relief, the SEC sought civil monetary penalties in addition to disgorgement and an injunction. J.A. 72.

The complaint alleged that Gabelli Funds negligently or intentionally violated Section 206 of the IAA[6] from 1999 to 2002, by allowing a customer to market time GGGF in exchange for a $1 million

---

[4] On the same day, the SEC settled an administrative action against Gabelli Funds. Joint Appendix dated Oct. 29, 2010 at 33-43, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581).

[5] The complaint also alleged Alpert violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5, and Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a). J.A. 75.

[6] Section 206 of the IAA, 15 U.S.C. § 80b-6(1)-(2), provides, in pertinent part:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client[.]

investment in a hedge fund Gabelli managed, without disclosing that alleged arrangement to GGGF's board of directors. J.A. 80-81, 86. The complaint alleged that customer made the hedge fund investment in April 2000 and that the customer continued to invest in GGGF until August 7, 2002, when the customer was barred from trading by GGGF. J.A. 81, 83. The SEC alleged that petitioners knowingly and substantially assisted Gabelli Funds' Section 206 violations and thereby aided and abetted those violations. J.A. 92-93. The SEC did not allege when it discovered the alleged violations, but only that it did not discover it before "late 2003, at the earliest." J.A. 89.

3. On March 17, 2010, the district court dismissed the SEC's claim for penalties as untimely. Pet. App. 37a-38a. The SEC argued that its claim did not accrue until it discovered it and, alternatively, that its time to sue was suspended by fraudulent concealment. The court rejected those arguments and held, in relevant part, that the limitations period in 28 U.S.C. § 2462 began to run when the alleged violation occurred and accrued no later than August 7, 2002, when the alleged violation ended and that, in the absence of a statute to the contrary, "the discovery rule does not apply to claims subject to the limitations of § 2462." Pet. App. 36a. The court also held that the SEC could not invoke the doctrine of fraudulent concealment because it had failed to "allege with particularity under Rule 9(b) what acts Defendants took, *beyond the alleged acts of wrongdoing themselves*, or what contrivance or scheme

was designed to mask the SEC's causes of action." Pet. App. 39a.[7]

4. The SEC appealed the district court's discovery rule holding (but not its fraudulent concealment holding)[8] and, on August 1, 2011, the court of appeals reversed. Pet. App. 1a. The court of appeals recognized that the relevant language from Section 2462 provided that "a claim for civil penalties must be brought within five years 'from the date when the claim first *accrued*.'" Pet. App. 17a (quoting 28 U.S.C. § 2462). Nonetheless, it agreed with the government's argument that "the claim did not 'accrue' until September 2003 when, as the complaint alleges, the SEC first discovered the fraud." Pet. App. 17a. In so holding, the court distinguished the discovery rule from the "distinct" doctrines of fraudulent concealment and equitable tolling, which the district court had held did not apply and the SEC had abandoned on appeal. Pet. App. 18a-19a. The court stated that "[u]nder the discovery rule, the statute of limitations for a particular claim does not accrue until that claim is discovered, or could have

---

[7] The court denied petitioners' motion to dismiss the complaint for failure to state a claim but granted their motion to dismiss the request for injunctive relief, ruling that the SEC's allegations did "not plausibly allege a reasonable likelihood that the Defendants will engage in future violations." Pet. App. 47a. After the district court ruled, the SEC successfully moved to dismiss its sole remaining claim for disgorgement. J.A. 105-06.

[8] On appeal, the SEC abandoned its fraudulent concealment argument and conceded equitable tolling did not apply. Brief of the SEC at 35, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581); Transcript of Oral Argument at 27:21-23, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581).

been discovered with reasonable diligence, by the plaintiff." Pet. App. 18a. The court reasoned that "since fraud claims by their very nature involve self-concealing conduct, it has been long established that the discovery rule applies where, as here, a claim sounds in fraud." Pet. App. 18a.

Thus, the court concluded categorically, "since the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme . . . the discovery rule defines when the claim accrues and, correlatively . . . the SEC need not plead that the defendants took affirmative steps to conceal their fraud." Pet. App. 19a. The court stated: "while Congress might have to affirmatively include language about a discovery rule in the event that it wanted a discovery rule to govern the accrual of non-fraud claims or wanted to impose a limit on using a discovery rule for certain fraud claims, it would be unnecessary for Congress to expressly mention the discovery rule in the context of fraud claims, given the presumption that the discovery rule applies to these claims unless Congress directs otherwise." Pet. App. 20a (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). The court further ruled that the SEC need not affirmatively plead facts sufficient to establish it did not discover the fraud earlier, stating "[t]he lapse of a limitations period is an affirmative defense that a defendant must plead and prove." Pet. App. 21a (citation and internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

Section 2462 and its predecessors have been on the books for more than two centuries. During that period, the government and its agencies have been subject to a clear rule when they seek to impose a penalty, fine or forfeiture: the limitations period begins when the government's right to sue first arises, regardless whether the government knows of that right, and expires when the limitations period concludes. If the government fails to timely sue, the defendant is entitled to repose. That rule has furthered all of the objectives of the statute of limitations: it has encouraged the government to devote its limited resources to fresh claims, it has prevented the government from bringing stale claims after necessary witnesses and evidence are no longer available, and it has protected the societal interest in repose. When the government has not had sufficient time to adequately investigate a particular category of violation, it has sought an extension of the statute of limitations from Congress, and when Congress has believed such extension appropriate, it has granted one.

The court below, for the first time ever, held that the statute of limitations began to run not when the government first had the right to sue, but rather when the government alleges it realized it had the right to sue. In so doing, the court undermined all the salutary objectives of the statute of limitations. It gave the government the right to set the clock for when it must bring a claim, rather than requiring it to abide by the congressionally established clock. It permitted the government to sue for a penalty long after the evidence necessary for a defense has vanished. And, it cast

aside the societal interest in repose—permitting the government to reach as far back in time as it wants to bring a penalty claim subject only to the affirmative defense (to be pleaded and proved only after a defendant suffered the harm of being named in a governmental penalty action) that the government knew or should have known of its cause of action earlier (without explaining how, short of public disclosure, that burden could be satisfied).

That result violates the plain language of Section 2462. That statute as written provides that a court may not entertain a claim for a penalty unless suit is brought within five years of the date the claim first "accrued," a term that was understood at the time the statute was enacted—and continues so today—to mean when a claim was complete and the plaintiff had a legal right to sue. It also violates other established principles of statutory interpretation: Congress knew how to "provide otherwise" when it wanted a statute of limitations to run from the date of discovery or some other date than the date the claim arose. Congress did so in connection with a number of other statutes the language of which would be rendered surplusage if the court of appeals' understanding of "accrual" were correct. The decision below would also lead to absurd results. Under the government's theory that the Second Circuit endorsed, no one would ever enjoy repose from a potential governmental enforcement action. And, it is inconsistent with Section 2462's history. Until the decision of the court below, no appellate court had ever concluded that the mere fact that the government charged the defendant with violation of an anti-fraud statute gave the government

license to bring that claim without regard to the congressionally established statute of limitations.

The decision of the court below was error. The determination how to strike the balance between law enforcement and repose involves policy judgments entrusted by the separation of powers and statute to Congress. The political process cannot be avoided by judicial reference to the "discovery rule." Even if the statute had not precluded its application, the discovery rule is singularly inapplicable. It was developed by case law and statute in some States to defer the running of the statute of limitations on a claim by a fraud victim until the victim knew or should have known of the injury or damage that was an essential element of its cause of action. The rule was not consistently applied at the time of Section 2462's passage. It has no place in the interpretation of a federal statute regarding a governmental penalty claim that does not even require proof of damage or injury. The applicable presumption is one that has been followed since the founding of the Republic: the presumption against perpetual penalties.

Congress knew how to specify clearly that a claim should be "deemed to accrue" on a date later than the date the claim actually accrued. It also knew how to legislate a time period greater than five years if it desired to do so. It did neither here. If the SEC believes that the current statute of limitations does not give it sufficient time to investigate any category of violation, the answer is for it to ask Congress for more time. It is not to create a judicial rule that would have the statute begin to run on the date of discovery for any

statute that a court might deem, as a categorical matter, to "sound in fraud."

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 2462 PROHIBITS A COURT FROM ENTERTAINING A PENALTY ACTION MORE THAN FIVE YEARS AFTER THE CLAIM ACCRUED

A. A Claim Accrues When The Factual And Legal Prerequisites For Bringing Suit Are In Place

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also Dodd v. United States*, 545 U.S. 353, 359 (2005) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.")(citation and internal quotation marks omitted) (alteration in original); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (holding that statutory provision itself answered the question whether the discovery rule applied). The language of Section 2462 could not be more plain:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary

> or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

This Court has held that the language "first accrued" or "accrued" as used in other statutes refers to the "point of time the cause of action has come into existence" or "the events have occurred which determine that the [defendant] is liable." *Reading Co. v. Koons*, 271 U.S. 58, 64 (1926); *see also Crown Coat Front Co. v. United States*, 386 U.S. 503, 511, 514 (1967) (claim "first accrues" under 28 U.S.C. § 2401 when plaintiff first has "the right to file a civil action in the courts against the United States" and the "claim or right to bring a civil action against the United States matures"); *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 65 (1953) ("A cause of action is created when there is a breach of duty owed to the plaintiff."). This Court has also rejected the argument that the single word "accrued" or phrase "first accrued" should be given different interpretations depending on the claim that is alleged to have accrued, reasoning that "the fact that the limitation is made applicable equally to the Two causes of action, one of which admittedly 'accrues' on the happening of the events which fix the defendant's liability, leads persuasively to the conclusion that a like test was intended for determining when the cause of action accrued for wrongful death [*i.e.*, the other cause of action]." *Reading*, 271 U.S. at 64.

There is no reason to believe that Congress had a contrary intent in enacting Section 2462. The statute provides that an action for a civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim "first accrued." "In common parlance a right accrues when it comes into existence . . . ." *United States v. Lindsay*, 346 U.S. 568, 569 (1954). It refers to the moment "when the [government] has 'a complete and present cause of action,'" not only when it knows it does. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). In a case involving a comparably worded statute of limitations, 28 U.S.C. § 2501, the government itself has remarked that "[i]t is settled law that claims first accrue when plaintiffs are first able to file suit." Brief for the United States at 11, *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (No. 01-455), 2002 WL 471831.

Moreover, Congress provided that the five years from accrual rule applied uniformly to a claim for "any" fine, penalty or forfeiture. The statute does not distinguish among penalties based on anti-fraud statutes, penalties based on statutes that did not sound in fraud, or other penalties. *See, e.g., Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))). Congress thus made clear that it wanted the same rule to apply to all penalty, fine or forfeiture claims. *See Reading*, 271 U.S. at 63-64 (interpreting "accrued" in Federal Employers' Liability Act "to apply uniformly to

the time when the events have occurred which determine that the carrier is liable" regardless of whether claims are based on death or on personal injury).

This plain meaning interpretation is consistent with Nineteenth Century dictionary definitions. At the time of the enactment of Section 2462's predecessors, dictionaries defined "accrue" to mean to "arise, or begin to have a legal existence; as an action accrues when the plaintiff has a right to commence it," 1 Alexander M. Burrill, *A New Law Dictionary and Glossary* 3 (1850), and made clear that a "[c]ause of Action shall accrue or shall have accrued. . . . whenever the defendant's liability became perfect and complete," 1 *American and English Encyclopaedia of Law* 142 (John H. Merrill ed., 1887).[9] That definition remained consistent throughout the Twentieth Century when Congress enacted Section

---

[9] *See also* 1 Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 14-15 (1888) ("A right is said to accrue when it vests in a person . . . . Thus, the statue[s] of limitation contain provisions for ascertaining when the right to be barred is deemed to have first *accrued*, i.e. vested in the person entitled to exercise it."); 1 John Bouvier, *Bouvier's Law Dictionary* 66 (1897) (defining accrue as "[t]o arise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has accrued"); 1 Noah Webster, *An American Dictionary of the English Language* (1828) (defining accrue as "to grow to; hence to arise, proceed or come"); 1 John Bouvier, *A Law Dictionary* 50 (5th ed. 1855) (defining accrue as "to arise, to happen, to come to pass; as the statute of limitations does not commence running until the cause of action has accrued"); Charles Richardson, *A New Dictionary of the English Language* (1839) (defining accrue as "to arise, or spring from; to be produced or derived from, in addition, or accession").

2462's most recent predecessor in 1911 and its current form in 1948.[10] It is also consistent with current definitions of the term "accrue."[11] Under all these definitions, a claim accrues when it arises and the plaintiff has the *right* to sue, not when it discovers that it has that right.

Here, the SEC's penalty claim "first accrued" when the SEC first had a right to sue petitioners for a penalty and expired five years later. Section 209(e)(1) of the IAA gives the SEC the right to bring a penalty action "[w]henever it shall appear . . . that any person has violated any provision" of the IAA. 15 U.S.C. § 80b-9(e)(1). On the SEC's theory, the penalty claim accrued as early as September 1999, when the IAA

---

[10] *See, e.g.*, *Black's Law Dictionary* 18 (2d ed. 1910) (defining accrue as "to arise, to happen, to come into force or existence; to vest; as in the phrase, 'The right of action did not accrue within six years'"); John Bouvier, *Bouvier's Law Dictionary* 34 (William E. Baldwin ed., 1948) (defining accrue as "to arise, to happen, to come to pass, as the statute of limitations does not commence running until the cause of action has accrued"); James A. Ballentine, *The College Law Dictionary* 11 (2d. ed. 1948) (defining accrue as applied to a cause of action as "to arrive; to commence; to come into existence; to become a present and enforceable demand").

[11] *See, e.g.*, *Black's Law Dictionary* 23 (9th ed. 2009) (defining the term accrue, as applied to a claim, to mean "to come into existence as an enforceable claim or right; to arise"); *The American Heritage Dictionary* 12 (3d ed. 1994) ("[t]o come into existence as a claim that is legally enforceable"); Merriam-Webster.com, *available at* http://www.merriam-webster.com (Aug. 7, 2011) (defining accrue as "[t]o come into existence as a legally enforceable claim"); *Random House Compact Unabridged Dictionary* 13 (spec. 2d ed. 1996) (defining accrue as "to become a present and enforceable right or demand").

violation petitioners allegedly abetted began, and no later than August 2002 when it ended. J.A. 73-74, 82-83. The alleged violation was complete and the SEC could have sued as of those dates.[12] *See, e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985). Yet, the SEC waited until April 24, 2008, to commence this action for a penalty—long after the five year period from the latest date on which a penalty claim could have accrued (even taking into account the time covered by a tolling agreement). Thus, under the plain language of Section 2462, the SEC's penalty claim is too late.

B. The Structure Of Section 2462 Reflects Congress's Intent That Courts Not Entertain Penalty Actions Unless Commenced Within Five Years Of The Date The Government First Had The Right To Sue

The structure of Section 2462 confirms what the plain language of the section says: the government must bring a claim for a penalty within five years of when it first had the right to sue for a penalty unless Congress otherwise provided. Congress made a single explicit exception to the rule that a penalty action must

---

[12] Courts uniformly recognize that IAA claims are complete and accrue at the time of violation. *See, e.g.*, *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1042 (2d Cir. 1992) (holding that cause of action under the IAA accrued "when the agreements were entered into"); *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007) (SEC's IAA claim time-barred under Section 2462 where claim was filed "six years after the alleged wrongdoing").

be brought within five years from when it first accrued. It specified that penalty claims need not be brought within five years where "the offender or the property is [not] found within the United States" to effect service of process. 28 U.S.C. § 2462. It did not provide that such claims need not be brought where the government did not know and reasonably should not have known of its claim. "'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *TRW*, 534 U.S. at 28 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). The point is highlighted by Congress's use of the language "*first* accrue."

Section 2462 also specified in language that could not be more clear that the rule that penalty claims must be commenced within five years of the date on which the SEC first had the right to commence its lawsuit is subject to a single qualification: "Except as otherwise provided by Act of Congress." This language could scarcely be considered "surplusage." It must be given effect. *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Thus, if there are to be exceptions to Section 2462's strict command, those exceptions must come from Congress and may not be implied by the courts. *See Toussie v. United States,* 397 U.S. 112, 115 (1970).

Finally, the language of Section 2462 is peremptory. It directs that the courts "shall" not entertain "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise"

unless such action, suit or proceeding is "commenced within five years from the date when the claim *first accrued*." 28 U.S.C. § 2462 (emphasis added). That language, too, admits of no exceptions except as otherwise provided by Congress itself—and not by the courts. "'The word 'shall' is ordinarily the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). It "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Thus, contrary to the decision below, the statute does not give the courts room to entertain some tardy penalty claims—but not others—based on the court's assessment that the government "will be able to discover the conduct underlying non-fraud claims" but not discover the conduct underlying fraud claims within the otherwise applicable limitations period. Pet. App. 19a.

II. CONGRESS KNEW HOW TO DRAFT A DISCOVERY RULE AND DID NOT IN SECTION 2462

When Congress "wished to" include a discovery rule in a statute of limitations, "it knew how to do so and did so expressly." *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so."); *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) ("When Congress wished to create such liability, it had little trouble doing so."). "Congress . . . has taken a statute-by-statute approach" to the discovery rule throughout the

United States Code, specifying that the statute of limitations should run from the date of discovery in some instances but not in other instances. *Cent. Bank*, 511 U.S. at 182. It did not provide that the statute should run from the date of discovery in Section 2462, and this Court should not substitute that rule by implication.

Section 2415 of Title 28 provides that every action for money damages founded on a tort or contract claim must be brought within three or six years, respectively, after the right of action "accrues," "except as otherwise provided by Congress." 28 U.S.C. § 2415(a) & (b). Congress has "otherwise provided" in that situation by enacting Section 2416 of Title 28, which explicitly provides that "[f]or the purpose of computing the limitations periods *established in section 2415*," a number of time periods are excluded including, among others, "all periods during which . . . facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances[.]" 28 U.S.C. § 2416(c) (emphasis added).[13] That statute pointedly does not provide that time is excluded "for the purpose of computing the

---

[13] According to the House Report, "the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action." H.R. Report No. 89-1534, at 7-8 (1966).

limitations period established for a penalty claim by Section 2462."[14]

The Tariff Act of 1930, 19 U.S.C. § 1621(1), likewise, provides in pertinent part that "in the case of an alleged violation of section 1592 and 1593a of this title,[15] no suit or action . . . may be instituted unless commenced within 5 years after the date of the alleged

---

[14] The statute of limitations set forth in Section 2415 uses the word "accrue" the same way Section 2462 does—as the date the claim came into existence. *See, e.g.*, 28 U.S.C. § 2415(b) (every action for money damages founded upon a tort is barred unless brought within three years "after the right of action first accrues"). The Justice Department's statement accompanying the proposed bill reflects all of the considerations that also require interpreting Section 2462 according to its plain language (and without implying an exception that Congress in passing Section 2416 decided not to make) including, among other things, "the effective and fair conduct of Government litigation requires that lawsuits be instituted and trials held in reasonably prompt fashion . . . . Experience tends to justify the thesis that stale claims are usually neither effective claims nor just claims" and that "potential defendants are entitled eventually to put to one side thoughts of possible suits against them. At some point, and with some exceptions, bygones should be bygones." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before the H. Comm. on the Judiciary*, 89th Cong. 6-7 (1966) (statement of John W. Douglas, Assistant Att'y Gen., Civil Division, Department of Justice); *see also* H.R. Report No. 89-1534, at 4, 8, 11 (1966); S. Rep. No. 89-1328, at 2, 7 (1966); 112 Cong. Rec. 14378 (1966) (statement of Sen. Ervin).

[15] Sections 1592 and 1593a of Title 19, address, respectively, persons who "introduce any merchandise into the commerce of the United States" or "seek . . . the payment or credit . . . of any drawback claim" using a statement that is "material and false."

violation or, if such violation arises out of fraud, within 5 years after the date of discovery of [the] fraud."[16] *See also* 19 U.S.C. § 1641(d)(4). That language would have been unnecessary and surplusage if, as the Second Circuit held, Section 2462 already provided for the statute to run from date of discovery in the event of a fraud. *See, e.g., Reiter*, 442 U.S. at 339. The False Claims Act, 31 U.S.C. § 3731(b), a law that pertains only to claims that "sound in fraud," also contains an explicit discovery provision. It states: "A civil action under section 3730[17] may not be brought (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed whichever occurs last."[18]

---

[16] The suit or action that is authorized is that for a fine, penalty or forfeiture that Section 2462 otherwise governs. *See* 19 U.S.C. §§ 1592(c)(1), 1593a(c)(1).

[17] Section 3730 authorizes the Attorney General to bring a civil action against any person that violates Section 3729 of Title 31, which in turn authorizes "a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. §§ 3730(a), 3729(a)(1).

[18] *See also* Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 335b(a)(1) & (b)(3) (authorizing civil penalties against persons who "knowingly" make "a false statement or misrepresentation of a material fact in connection with an abbreviated drug application" and requiring an action to collect such a penalty to be filed within

In drafting the federal securities laws themselves, Congress explicitly used the language of discovery when it wanted the limitations period to run from the date of discovery and did not use that language when (as in the case of governmental penalty claims) it did not intend the statute to run from date of discovery. Thus, in Section 323 of the Trust Indenture Act of 1939, Congress explicitly provided that a claim against a defendant for making a "false or misleading" statement "in any application, report, or document filed with the Commission" must be brought "within one year after the *discovery* of the facts constituting the cause of action and within three years after such cause of action *accrued*." 15 U.S.C. § 77www(a) (emphasis added). Congress adopted identical language in Section 18(c) of the Exchange Act of 1934, drawing a distinction between the date of "accru[al]" and the time of "discovery" for claims relating to "false or misleading" statements "in any application, report or document filed pursuant to this chapter." 15 U.S.C. § 78r. It also has drawn a similar distinction between the time of the violation and the time of discovery in other statutes of limitations applicable to private rights

---

"6 years after the date when facts material to the act are known or reasonably should have been known . . . but in no event more than 10 years after the date the act took place"); Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. § 1817(g) (authorizing FDIC to assess civil penalties and to collect such assessments through actions "brought within 3 years after the date the assessment payment was due" unless the defendant "has made a false or fraudulent statement with intent to evade any or all of its assessment," in which case "the Corporation shall have until 3 years after the date of discovery of the false or fraudulent statement in which to bring an action").

of action throughout the federal securities laws (*see, e.g.*, 28 U.S.C. § 1658(b), 15 U.S.C. § 78i(f), 15 U.S.C. § 77m).

Congress also provided that a "right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of [the securities laws]" may be brought "2 years after the discovery of the facts constituting the violation," but only if the right of action is a "private" one, not if it is a governmental one for penalties. 28 U.S.C. § 1658(b). Even then, Congress limited the period for a private defrauded victim—one without the extensive powers of the SEC—to bring such a claim to recover *damages* to five years after the violation. *Id.* That limitation, and the repose Congress intended to provide, would be defeated if at the same time those same defendants were subject to open-ended liability for a penalty from a regulator who was not a victim.

Indeed, when Congress wanted the date of accrual to be something other than the date the claim was complete and the plaintiff had the right to sue, Congress explicitly "deemed" the date of accrual to be a date other than the real date of accrual.[19] Congress provided, for example, that the limitations period for a claim based on "a false or fraudulent certified statement" filed by an insured credit union with the National Credit Union Administration Board begins to run not when it has accrued but when it is "deemed to

---

[19] *Black's Law Dictionary* (9th ed. 2009) (defining "deem" as "[t]o treat (something) as if (1) it were really something else, or (2) it has qualities it does not have").

have accrued," a date defined by "the discovery by the Board of the fact that the certified statement is false or fraudulent." Federal Credit Union Act, 12 U.S.C. § 1782(e); *see also* 28 U.S.C. § 2409a(g) ("Any civil action under this section [*i.e.*, real property quiet title actions], except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be *deemed to have accrued* on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." (emphasis added)); *see also* 28 U.S.C. § 2415(d) (six-year statute of limitations for actions for the recovery of money erroneously paid: "*Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action *shall be deemed to accrue again* at the time of each such payment or acknowledgment" (emphasis added)).[20]

---

[20] State legislatures have followed a similar practice. *See, e.g.*, Nev. Rev. Stat. § 11.190(3)(d) (requiring fraud claims to be filed within three years "but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud"); Ariz. Rev. Stat. § 12-543(3); Cal. Civ. Proc. Code § 338(d); Idaho Code Ann. § 5-218; Iowa Code § 614.4; Kan. Stat. Ann. § 60-513(a)(3); Md. Code Ann. § 5-203; Minn. Stat. Ann. § 541.05(6); Miss. Code § 15-1-67; Mo. Rev. Stat. § 516.120(5); Mont. Code Ann. § 27-2-203; N.D. Cent. Code § 28-01-16(6); Neb. Rev. Stat. § 25-207; N.M. Stat. Ann. § 37-1-7; N.C. Gen. Stat. § 1-52(9); Okla. Stat. tit. 12, § 95(3); S.D. Codified Laws § 15-2-3; Wash. Rev. Code § 4.16.080(4); Wis. Stat. § 893.93(1)(b); Wyo. Stat. Ann. § 1-3-106. *See Cent. Bank*, 511 U.S. at 185 (holding that Congress's failure to explicitly provide for aiding and abetting liability when eleven States did so explicitly shows that Congress did not intend for there to be aiding and abetting liability).

Congress did not include language of "discovery" or "deem" in Section 2462 or in the specific penalty provision of the federal securities laws that is relevant here. It could have done so if it wanted discovery to apply to Section 2462. It chose not to. The government thus should not be heard to seek by judicial fiat what it could not obtain by legislation. "The fact that Congress chose to impose" a discovery rule in some statutes of limitations, "but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Cent. Bank*, 511 U.S. at 184.

III. THE DECISION BELOW IS INCONSISTENT WITH THE DISCOVERY RULE

The court below improperly redefined "accrue" in Section 2462 based on this Court's decision in *Bailey v. Glover*, 88 U.S. 342 (1874), and what it characterized as the "discovery rule." Even if their application were not otherwise precluded by Section 2462's language, *Bailey* does not apply to the facts of this case and the discovery rule could not apply as a matter of law.

A. This Case Does Not Involve The Doctrine Of Fraudulent Concealment Or Equitable Tolling

In decisions spanning a century, this Court has confirmed that *Bailey* and the Court's later decision in *Holmberg* were based on principles of fraudulent

concealment and equitable tolling:[21] where a defendant has concealed a fraud from the plaintiff or committed a fraud "of such character as to conceal itself [from the plaintiff], the statute [for a fraud claim] does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." *Bailey*, 88 U.S. at 349-50; *see also Holmberg v. Ambrecht*, 327 U.S. 392, 396-97 (1946). The Court has described the rule as being "in *mitigation* of the strict letter of general statute of limitations." *Bailey*, 88 U.S. at 347 (emphasis added); *see also* H.G. Wood, *A Treatise on the Limitations of Actions at Law and in Equity* § 274 (1901) (describing the discovery rule as "a judicial exception engrafted upon the statute, by the assumption of legislative and equitable powers, and is not warranted by any principle or rule of law, nor can it be supported by any known rule for the construction of statutes"). Those principles require the plaintiff to plead and affirmatively prove that the defendant affirmatively concealed the existence of her wrongful conduct from the plaintiff, frustrating the plaintiff's ability to bring a timely claim. *See, e.g.*, *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20

---

[21] *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012); *Holland v. Florida*, 130 S. Ct. 2549, 2562-63 (2010); *Young v. United States*, 535 U.S. 43, 49 (2002); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 551 & n.5 (2002); *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001); *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 184 (1997); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 647-48 (1992); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.4 (1990); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974); *Int'l Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 711 & n.2 (1966); *Traer v. Clews*, 115 U.S. 528, 537 (1885).

(2012); Pet. App. 38a-39a. Fraudulent concealment is thus case-specific and focuses on the conduct of the individual defendant; it does not make all frauds "self-concealing" or deprive all persons accused of aiding and abetting a fraud of the protection of the statute of limitation regardless whether they engaged in concealing conduct. *See* 2 Calvin W. Corman, *Limitations of Actions* § 9.7.1 (1991). In *Bailey*, for example, plaintiffs made "a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which is sought to be redressed." 88 U.S. at 348-49. The complaint alleged that the defendants "kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge [of plaintiffs], whereby both [plaintiffs] were prevented from obtaining any sufficient knowledge or information thereof [and] . . . had not been able to obtain full and particular information as to the [fraud]." *Id.* at 343.

The district court correctly held that the government had not adequately pleaded fraudulent concealment, and the government correctly determined to abandon that argument on appeal and to concede that equitable tolling does not apply. Brief of the SEC at 35, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581); Transcript of Oral Argument at 27:21-23, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581). This Court has never held that fraudulent concealment or equitable tolling apply to the distinct context of a governmental penalty claim where the statute requires exceptions to be reflected in an Act of

Congress.[22] *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (doctrine of equitable tolling did not apply where "fundamentally inconsistent" with language of statute). Even if it had, as the district court concluded, there is no allegation that either petitioner ever concealed or attempted to conceal from the government the alleged violation for which it seeks a penalty. The SEC always

---

[22] *Holmberg* involved a private claim by creditors of a joint stock land bank. The creditors argued that an implied statute of limitations should not bar their lawsuit against the bank's owner because he had *actively concealed* his ownership of the bank's shares under a nominee name, thus frustrating the creditors' ability to file a timely claim. 327 U.S. at 393. The Court recognized that had there been a federal statute of limitations on point, "there is an end of the matter. The Congressional statute of limitation is definitive." *Id.* at 395. The Court also said, "[a]part from *penal enactments*, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications," and then ruled that "[w]hen Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Id.* at 395 (emphasis added). Applying those "historic principles of equity," the Court relied on "the old chancery rule that where a plaintiff has been *injured* by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" *Id.* at 397 (quoting *Bailey*, 88 U.S. at 348) (emphasis added). But here Congress has not left the statute of limitations to "judicial implications." It passed a "penal enactment" and it has not left to the federal courts the formulation of remedial details but has reserved those rights for itself. The only governmental case cited by the government is *Exploration Co. v. United States*, 247 U.S. 435 (1918), where the government was suing for restitution, standing in for a private stakeholder who was defrauded by a private party.

had the ability to obtain the information on which it based its complaint. The emails and other documents were readily available. It simply chose not to ask for them until the New York Attorney General announcement in 2003. J.A. 80-84, 88-89. Thus, the court of appeals did not hold and could not have held that fraudulent concealment or equitable tolling applied. Pet. App. 18a-19a.

B. The Discovery Rule Is Not Applicable

Unable to satisfy the requirements of fraudulent concealment, the government argued below for a more radical rule and the court below accepted it. The government argued, and the court agreed, that under *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), even if the defendant did not engage in any concealing conduct—presumably, even if the violation were known to the victim—the SEC's claim did not accrue because, as a categorical matter, when a penalty is sought under an antifraud statute, the time for the government to bring that claim begins to run only when the government knows or should have known of the violation. Pet. App. 18a-20a.

The court's holding rests on a fundamental misunderstanding of *Merck* and the discovery rule it discussed. *Merck* involved "a statute, not a court-created exception to a statute," that incorporated a discovery rule—namely Section 1658. *Merck*, 130 S. Ct. at 1797. It did not require the Court to interpret the term "accrue" or determine when a claim accrued where Congress provided that the government's claim arose upon the occurrence of a violation. This Court has also ruled that—in the absence of an express

federal statute of limitations—the statute of limitations for particular claims that require proof of injury begins to run on discovery of the injury. *See, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Even then, this Court has "not adopted [the] position" that "federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue.'" *TRW*, 534 U.S. at 27 (2001) (quoting *Rotella*, 528 U.S. at 555).

Those cases are not applicable here. They do not change the meaning of "accrue" or apply to claims where injury is not an element. Moreover, leaving aside that they have been applied only where the statute is either silent or explicitly runs from discovery, they discuss the date of accrual for a particular type of claim—one brought by a victim seeking damages on a claim where injury is an element. As the Court stated, the statute of limitations for a fraud claim requiring evidence of damage or injury is suspended "where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Merck*, 130 S. Ct. at 1793; *see also TRW*, 534 U.S. at 27 ("'where a *plaintiff has been injured* by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered'" (quoting *Holmberg*, 327 U.S. at 397) (emphasis added)). The rule is reflected in Section 2416, which explicitly suspends the running of the statute of limitations of a government claim for damages during the period that the government did not know and reasonably could not have known of its claim. 28 U.S.C. § 2416.

However, the discovery rule does not, as the government claims, give it open-ended license to

pursue a penalty claim without regard to when the violation occurred and whether the defendant took any action to deceive the government into not bringing its claim. Unlike a private claim by a fraud victim which cannot be sued on and does not arise until there is injury and where the deception of the victim that may be inherent in a particular violation would itself defeat timely filing, *see* Pet. App. 19a-20a, there is nothing in a statutory IAA claim—or any other statutory fraud claim—that makes such claim more difficult for the government to discover than any other statutory violation. *See, e.g.*, *SEC v. Obus*, 693 F.3d 276, 291 (2d Cir. 2012). It is just a matter of when and how the government chooses to investigate. Moreover, unlike a common law fraud claim or statutory claim that requires damages to be actionable, *cf.* Restatement (Second) of Torts §§ 525, 550 (1965) (noting damages as an element of fraudulent misrepresentation and fraudulent concealment), Congress did not require the SEC to prove it was defrauded or to prove damages or injury at all. Congress was silent: Congress gave the SEC the right to sue for a penalty as soon as an IAA violation took place, 15 U.S.C. § 80b-9(e)(1), and defined an IAA violation as a breach of the statute even if there never was any resulting injury. 15 U.S.C. § 80b-6 (elements of violation of IAA giving rise to civil penalty claim do not include injury); *see Capital Gains*, 375 U.S. at 191-92. Thus, both because Congress spoke to the issue and because the predicate for the discovery rule does not exist, the discovery rule cannot extend the time for the government to sue. *See 3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994) (rejecting application of the discovery rule to Section 2462 because "[t]he rationale underlying the discovery of injury rule—that a claim cannot realistically be said to

accrue until the claimant has suffered harm—is completely inapposite").

Finally, like the fraudulent concealment doctrine, the "discovery" rule is a modern one that was not in place—much less uniformly or consistently—at the time of the passage of the original Section 2462. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011) (only when Congress adopts statutory language that "'all (or nearly all) of the' relevant judicial decisions have given . . . a consistent judicial gloss," has the Court has been willing to "presume Congress intended the [language] to have that meaning" in the statute (quoting *Merck*, 130 S. Ct. at 1802)); *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (judicial authority before enactment was both "longstanding" and "settled" (internal citations omitted)).[23] Even where it was

---

[23] At the time Section 2462's predecessors were passed, courts of law in many states, including Virginia, North Carolina, New York, Kentucky, Tennessee and Vermont, refused to apply a discovery rule to statutes of limitations in the absence of explicit statutory text authorizing such a rule. *See, e.g.*, *Smith v. Bishop*, 9 Vt. 110, 116 (1837); *Pyle v. Beckwith*, 24 Ky. (1 J.J. Marsh.) 445 (1829); *Cocke v. McGinnis*, 8 Tenn. 361, 363-64 (1828); *Troup v. Smith*, 20 Johns. 33, 48-49 (N.Y. 1822); *Hamilton v. Shepperd*, 7 N.C. (3 Mur.) 115 (1819); *Callis v. Waddy*, 16 Va. (2 Munf.) 511, 511-12 (1811); *accord* John Francis Kelly, *A Treatise On The Code Limitations of Actions Under All State Codes* 277-79 (1903); J.B.G., Annotation, *When statutes of limitations commences to run against action to recover, or for conversion of, property stolen or otherwise wrongfully taken*, 136 A.L.R. 658 (1942) ("In the absence of a statutory provision suspending the statute of limitations where there is a concealment of the facts upon which a cause of action depends until the discovery of such facts by the person or persons entitled to bring suit, it was the early rule that although courts of

applied, courts historically did so based on the application of equitable principles and not as a matter of the interpretation of "accrue," and, even then, freely conceded that "much conflict of opinion" existed on the issue. *Kane v. Cook*, 8 Cal. 449, 458 (1857).[24]

Thus, even assuming that a fraud discovery rule could be read into the statute without language expressly providing it, the discovery rule would have no place in this case because Congress defined when the government's claim accrued and that definition does not require there to have been any damage or injury in the first place. The government must bring its suit within five years of when it had the right to file that suit; it had the right to sue when a violation occurred; and it is not permitted to delay on the basis of a rule that relates to injury or harm the government is never required to prove and is not even an element of its claim.

---

equity might suspend the running of the statute during the period of concealment, courts of law were without authority so to do.").

[24] *See, e.g.*, *Bricker v. Lightner*, 40 Pa. 199, 204 (1861) ("If Bricker did indeed commit the grievous fraud imputed to him, we hold him estopped from setting up the Statute of Limitations in defence of himself."); *First Mass. Tpk. Corp. v. Field*, 3 Mass. 201, 208 (1807) ("[A]lthough the plaintiffs' cause of action mentioned in the first count literally accrued at the time when the contract was to have been executed . . the fraud of the defendants, disclosed in the replications of the plaintiffs, is sufficient in law to avoid the statute of limitations pleaded in the defendants' bars . . . ").

C. The Presumption Against Perpetual Penalties Applies

To the extent there were any remaining ambiguity, it should be removed by a different presumption that applies in this case—the presumption against perpetual penalties.

The purpose of a penalty is to punish. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."). The "'penalty or forfeiture' in [predecessor Section 2462] refer[s] to something imposed in a punitive way for an infraction of a public law, and does not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915). In the case of SEC penalties, a defendant who has violated the law is not immune from punishment because he has returned (or never received) any benefit or ill-gotten gains. 15 U.S.C. § 80b-9(e)(3)(C); *see also* 15 U.S.C. § 80b-6 (elements of violation of IAA giving rise to civil penalty claim here does not include injury). Nor is he relieved from the threat of punishment, or its imposition, because he has settled with and made peace with his alleged victim or no longer poses a risk of violating the securities laws. *Cf. Obus*, 693 F.3d at 291 (alleged victim did not believe there was a violation). The penalty is based on a past violation that cannot be purged through return of funds or the

cessation of illegal activity. Indeed, SEC penalties are based on the number of violations and the defendant's intent, and not the injury caused.[25] As the SEC itself has acknowledged, civil monetary penalties "might be seen as standing at the border between civil and criminal sanctions." Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the U.S. Securities Laws (Sept. 19, 1998).[26]

Accordingly, the controlling principle in this case is that which has been in place since before the founding of the Republic: that the law abhors a perpetual penalty and that an individual cannot "remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.).[27] In *Adams*, this Court forcefully rejected the government's argument that no statute of limitations was applicable

---

[25] The SEC can seek penalties on a natural person in the amount of $7,500 for each violation; or $75,000 if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; or $150,000 if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and the violation resulted in "substantial losses or created a significant risk of substantial losses." 15 U.S.C. § 80b-9(e)(2); 17 C.F.R. § 201.1004. The penalties authorized to be imposed on defendants other than natural persons are even greater. *Id.*

[26] *Available at* http://sec.gov/news/speech/speecharchive/1998/spch222.htm.

[27] The principle of limiting the sovereign's time to sue for a penalty or forfeiture dates back to the Elizabeth I. *See* 31 Eliz. c. 5, § 5 (1588).

to the government's claim for a civil penalty because it was not sought in a criminal prosecution, reasoning that the penalty sought was a "punish[ment]" within the meaning of the statute. *Id.* at 340-41. The Court emphatically stated:

> In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.

Id. at 342.

Answering the hypothetical that there could be "no act limiting the time [for the government to bring a 'pecuniary penalty']," Justice Story enunciated the same principle, riding circuit, less than a decade later:

> If there had been no act limiting the time, within which prosecutions on penal statutes should generally be brought, there would have been considerable force in the argument, that the limitation of the act of 1799 was intended to be embraced in the 6th section of the act of 1808, for the reason stated by the court in *Adams v. Woods* . . . , that it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence.

United States v. Mayo, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813).

The same principle applies here where the plaintiff is the government seeking a punishment, not a private party seeking damages. Accordingly, to the extent there is any ambiguity, it must be resolved in favor of repose and not—as the government has argued—in favor of a perpetual penalty.

D. Reading A Discovery Rule Into Section 2462 Would Violate The Core Objectives Of Statutes Of Limitations And The Separation Of Powers

1. The Second Circuit's Discovery Rule Conflicts With The Purposes Of Statutes Of Limitations

This Court has long construed statutes of limitations to avoid interpretations that would be "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555; *see also Simmonds*, 132 S. Ct. at 1420 ("Allowing tolling to continue beyond the point at which a §16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable* and inconsistent with the general purpose of statutes of limitations: to protect defendants against stale or unduly delayed claims.") (citation and internal quotation marks omitted)); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (interpreting a statute of

limitations to avoid "conflict[] with a basic objective—repose—that underlies limitations periods"); *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895) ("[I]t is a cardinal principle of modern law and of this court . . . [that statutes of limitations] are not to be construed to defeat their obvious intent to secure the prompt enforcement of claims during the lives of witnesses, and when their recollection may be presumed to be still unimpaired.").

The Second Circuit's rule runs afoul of that fundamental principle. The discovery rule for common law fraud claims has a natural end date within the control of the defendant, and in any event, where Congress has included a discovery rule, it has also generally included a statute of repose. At some point, if a person has been injured by a fraud, that injury will manifest itself. *See Rotella*, 528 U.S. at 556; *3M*, 17 F.3d at 1460. In addition, the defendant can satisfy or moot a claim by paying for the damage it has caused or returning any ill-gotten gains whether the party injured is the government or not. By contrast, under the Second Circuit's rule, there is no ready way that an individual could ensure herself repose from a penalty claim. Our society is a free one. In the absence of statute, individuals are not required to self-report their own conduct, much less to do so to enjoy repose. *Cf. Grunewald v. United States*, 353 U.S. 391, 402 (1957); *Krulewitch v. United States*, 336 U.S. 440, 456 (1949) (Jackson, J., concurring). Even if they were, the statute of limitations protects against false claims as well as meritorious claims. The rule adopted by the Second Circuit would require a person to anticipate every accusation that might be made against her sometime in the future and then disclose those false

accusations to start the clock running herself. A potential defendant would not only need to be a self (and, perhaps, false) confessor but a soothsayer.

In the Second Circuit, then, when the clock starts to tick is entirely within the government's control. If the government chooses not to investigate, it will not—except in unusual circumstances—discover a violation and thus will not start the clock running. If the government chooses, for whatever reason, not to investigate, it will have no pressure to investigate: the clock will not start to run until it has not only started an investigation but substantially concluded it.

Thus, the rule below would undermine the central principles behind the statute of limitations. This Court has recognized that a statute of limitations embodies a principle of repose that is "vital to the welfare of society" and to "giv[e] security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). The principle does not just protect those who violate the law, but also society generally by permitting both the person who violated the law and the person who may be falsely accused—and all persons dealing with them—to order their affairs safe in the notion that, at some point, "bygones [will] be bygones." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before the H. Comm. on the Judiciary*, 89th Cong. 6-7 (1966) (statement of John W. Douglas, Assistant Att'y Gen., Civil Division, Department of Justice). It has particular force with respect to the securities laws where this Court has emphasized that business transactions "demand[]

certainty and predictability." *Cent. Bank*, 511 U.S. at 188 (citation and internal quotation marks omitted).

Statutes of limitations reflect a balance between the interests in law enforcement and in repose. The SEC has extensive powers and the five-year statute of limitations gives it sufficient time to fulfill the interest in law enforcement. It has the power "at any time, or from time to time, to [conduct] reasonable periodic, special, or other examinations . . . as the Commission deems necessary or appropriate," 15 U.S.C. § 80b-4, including of the books and records that registered investment advisers, such as Gabelli Funds and GGGF, must maintain; federal regulation requires those advisers to maintain and preserve "[a]ll books and records . . . in an easily accessible place for a period of not less than five years." 17 C.F.R. § 275.204-2(e)(1) & (2). The SEC can demand access to these advisory records, including detailed business, client, and account information, for any reason or no reason at all. *See* 15 U.S.C. § 80b-4. Unlike a private party, the SEC can take evidence, subpoena documents, and compel testimony before filing, and can do so merely on suspicion. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *see* 15 U.S.C. § 80b-4; 15 U.S.C. § 80b-9(b); 15 U.S.C. § 77s(c); 15 U.S.C. §§ 78u(a)-(b); 17 C.F.R. § 202.5.[28] The SEC requires that investment

---

[28] The SEC may also make both voluntary and involuntary requests for information and data on a host of regulated entities, including investment advisers, without serving an investigative subpoena. 17 C.F.R. § 202.5; 15 U.S.C. §§ 78q(a)-(b); 15 U.S.C. § 80b-4; Office of Chief Counsel, Securities and Exchange Commission, *Enforcement Manual* 46 (March 9, 2012), *available at* http://www.sec.gov/divisions/enforce/ enforcementmanual.pdf.

advisors file periodic reports listing the monthly sales and repurchases of the shares of a mutual fund such as GGGF and would have the ability—should it choose to use it—to require by regulation the reporting of additional information. *See* SEC Form N-SAR, Item 28, *available at* http://www.sec.gov/about/forms/formn-sar.pdf (current form substantially the same as when adopted by Release No. 34-21633, IC-14299, 32 SEC Docket 170, 1985 WL 58871, at *26 (Jan. 4, 1985)).[29] Petitioners—and those with whom they did business—were entitled to assume, when the SEC chose not to bring a penalty action within the limitations period, that the SEC would not bring a penalty action. If, despite its ample powers, the SEC believes it has insufficient time to investigate particular categories of violations, the answer is for the SEC to request more time from Congress. It is not to punish individuals like petitioners with tardy claims.

---

[29] In 2004, the SEC adopted a new rule requiring that mutual funds disclose their policies and procedures with respect to frequent purchases and redemptions of fund shares and the circumstances under which restrictions on such purchases and redemptions will not be imposed. SEC Form N-1A, Item 11(e), *available at* http://www.sec.gov/about/forms/formn-1a.pdf; *see also* Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, SEC Release No. 33-8408, IC-26418, 69 F. Reg. 22303, 2004 WL 865628, at *22302 (Apr. 23, 2004) (mutual funds must disclose "the identity of the persons permitted to engage in frequent purchases and redemptions and any compensation or other consideration received by the fund, its investment advisor, or any other party pursuant to such arrangements"); *cf. 3M*, 17 F.3d at 1461 n.15 (holding that violations were not "inherently undiscoverable" because regulator could pass a regulation requiring their disclosure (internal citation omitted)).

The Court has also recognized a related objective of statutes of limitations in bringing legislative "pressure" to bear on parties to assert their claims when they are fresh and have the greatest value. *See Klehr*, 521 U.S. at 187; *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143, 149, 151 (1987). That principle has special force for alleged securities fraud violations. If the SEC brings a penalty claim more than five years after the violation has occurred, a private party injured by the conduct alleged in the complaint cannot use the claim to recover damages. *See* 28 U.S.C. § 1658(b). Here, the SEC knew for years that market timers "timed" global funds, yet waited to investigate. *See* Mark T. Roche, Sean C. Adams & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, BNA Securities Regulation & Law Report, July 23, 2012, at n.3 and accompanying text (quoting SEC stipulation that "[b]eginning in the mid 1990s, the SEC knew about the practice of market timing in mutual funds, and the decision was to let the marketplace regulate itself"). The Second Circuit rule frustrates that objective by permitting the prosecuting agency to set its own dates for pursuing an investigation and, thereby, its own deadline for filing a claim rather than requiring it to abide by the congressionally-set deadline.

Statutes of limitations also protect persons—both the guilty and innocent alike—from the risk that between the time of an alleged violation and the time of a charge "evidence has been lost, memories have faded, and witnesses have disappeared." *See Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). That is why there is a five-year period from date of accrual. They are not generally concerned with

the time period between the government's decision to sue and its actual lawsuit. When a defendant is facing as serious a matter as a governmental penalty action, she has every right to defend herself. She is not required to rely on the government to collect evidence supporting her defenses. Here, the government seeks a penalty based exclusively on emails and documents, dating from 1999 to 2002. J.A. 80-83, 84. On its theory, however, it could have brought the action after the participants in those emails—whose testimony would be critical both to establishing that there was no violation and to the lack of wrongful intent that is an important element to the penalty determination—had vanished or expired. That clearly was not the intent of Congress in passing Section 2462 and in providing that the limitations period began when the claim accrued and expired five years thereafter.

2. The Second Circuit's Rule Is Unworkable

Congress has based the running of a governmental statute of limitations on the discovery rule in the limited circumstances when a false claim or submission is made to the government, or the government itself is the victim of a tort or breach of contract. *See, e.g.*, False Claims Act, 31 U.S.C. §§ 3729–33; Tariff Act of 1930, 19 U.S.C. ch. 4; 28 U.S.C. §§ 2415–16. Even then, Congress generally specified what it meant by discovery or whose knowledge was at issue. 31 U.S.C. § 3731 ("facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"); 19 U.S.C. § 1621 ("discovery of [the] fraud"); 28 U.S.C. § 2416 ("facts material to the

right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances").

The inquiry those statutes call for is judicially administrable and workable in practice. Where a party has victimized the government, it is a relatively easy matter to determine when the official charged with the responsibility to act in the circumstances knew or should have known of the "facts material to the right of action." 28 U.S.C. § 2416. The inquiry into the government's affairs is relatively discrete—what did the relevant individual know about the performance of a contract to which the government itself was a party, or a violation in which the government was victim, and some (or all) of that information will be in the possession of the defendant herself. Moreover, information regarding when the government knew a contract with it was breached or it suffered a tort would not be subject to any law enforcement privileges. And there will be a standard against which the government's diligence can be measured—what should a reasonable person in similar circumstances have known. The statute of limitations can operate as a real defense.

By contrast, except in the rarest of circumstances (those in which the defendant self-reported), information regarding when the government knew or should have known of a violation will be exclusively in the hands of the government and its discovery presents issues of enormous difficulty. The government alone knows all the tips it received, witnesses it interviewed, and documents it analyzed—and when it received that information. The documents and testimony which

would reveal that information also traditionally has been subject to a myriad of governmental privileges. "[I]nformation pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel [or] the privacy of individuals involved in an investigation, and information that would otherwise . . . interfere[ ] with an investigation" is protected by the law enforcement privilege. *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (internal quotations omitted; brackets in original). Communications between government employees and their counsel made for the purpose of obtaining legal advice regarding government investigations and enforcement decisions are protected by the attorney client privilege. *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007). "[A] document [prepared by law enforcement] in the course of an investigation that was undertaken with litigation in mind" is protected from disclosure by the work-product doctrine. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991); *see Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). "[D]ocuments reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" is protected by the deliberative process privilege. NLRB *v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation omitted). Assuming any of those doctrines apply, the government could assert that it recently discovered a claim—but the defense would have no way to test that assertion or to discover the evidence that would contradict it.

Moreover, even assuming a court were willing to tolerate the intrusion into law-enforcement necessary for a defendant to discover who knew what when, the discovery rule asks the wrong question. An agency may not "know" of a violation because it has allocated resources elsewhere, because it has placed a higher law enforcement priority on other conduct, because its enforcement program is ill-designed or inefficient, or because it does not have the appropriate personnel for the task. *See 3M*, 17 F.3d at 1461. It may not "know" because one person somewhere in a vast agency with one piece of information fails to speak to another with a different piece of information or because, having the evidence, the government did not realize that there was a violation. The questions regarding why the government chose to collect certain evidence and not other evidence, and what it knew when, are matters for Congress or the ballot box; they historically have been considered "particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). The agency's failure to detect violations, for whatever reasons, does not avoid for the defense the problems of faded memories and lost documents and witnesses. *3M*, 17 F.3d at 1461.

3. The Second Circuit's Discovery Rule Conflicts With The Separation Of Powers

The court of appeals' decision will inevitably involve the courts in intractable—and constitutionally inappropriate—case-by-case policymaking in determining which statutes "sound in fraud" and fall within the scope of its judicially fashioned discovery rule, and which do not.

This Court should hesitate before embracing a "sound in fraud" test that is not susceptible of ready application. Our modern administrative state includes many provisions that, like Section 206 of the IAA, could be seen as authorizing a federal agency to impose penalties for violation of a statute that "sounds in fraud." There are statutes authorizing penalties for the manipulation or attempted manipulation of the price of any commodity in interstate commerce or manipulation or attempted manipulation in violation of certain provisions of the Commodity Exchange Act (7 U.S.C. § 9(10)(c)(ii); 7 U.S.C. §§ 13a, 13a-1); for the alteration or defacement of a permit or other document provided for under the Plant Protection Act (7 U.S.C. § 7734(b)); for knowingly distributing or exhibiting a film which bears the seal of the National Film Registry if such film is not included in the National Film Registry or a sound recording which bears the seal of the National Recording Registry if such recording is not included in the National Recording Registry (2 U.S.C. § 179r(b)(2); 2 U.S.C. § 1703(e)(2)(B)); and for presenting a claim for a service that such person knows or should know is for a service for which payment may not be made under the Social Security Act (42 U.S.C. § 1395nn(g)). Some of these statutes are limited to intentional violations; others reach more broadly. Some statutes might be considered to "sound in fraud" or be an "antifraud" statute; others not.

The same can be said about the federal securities laws specifically. Those laws address and authorize the imposition of civil penalties (15 U.S.C. §§ 77t(d), 78u(d)(3)) for conduct ranging from the failure to keep records which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the

assets of an issuer (15 U.S.C. § 78m(b)(2)(A)); the sale of a security without a registration statement in effect or with a registration statement in effect that contains an untrue statement of a material fact (15 U.S.C. §§ 77e(a), 77k); the use or employment of any manipulative or deceptive device or contrivance in connection with a sale of a security or the making of an untrue statement of fact in connection with a tender offer (15 U.S.C. §§ 77q(a), 78j, 78n(e)); and the filing of forms reflecting the beneficial ownership of shares by directors, officers and principal stockholders (15 U.S.C. § 78p(a)); and a breach of fiduciary duty involving personal misconduct in respect of any registered investment company (15 U.S.C. § 80a-35(a)); to the conduct at issue here (15 U.S.C. § 80b-6). This Court has directed that these laws are "to be construed . . . not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Capital Gains*, 375 U.S. at 195.[30] Once again, some of these statutes require proof of deception or intent; others reach more broadly. Section 206(2), one of the provisions at issue here, does not require proof of intent or deception. 15 U.S.C. § 80b-6; *Capital Gains*, 375 U.S. at 191-92.

Section 2462, like other statutes, "'reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.'"

---

[30] *See also SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Pinter v. Dahl*, 486 U.S. 622, 653 (1988); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983); *Aaron v. SEC*, 446 U.S. 680, 693-95 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990)). It also charges that such determination must be reflected in an "Act of Congress" and not in the mere title assigned to a statute. *TRW*, 534 U.S. at 38 (Scalia, J., concurring) (questions regarding how "to strike the balance between remediation of all injuries and a policy of repose" are "properly directed not to us, but to Congress"). It may be that the conduct addressed by certain of these statutes is more difficult to detect than the conduct addressed by others, or that the value of repose is lesser with respect to some activities versus others. But that is a distinctively legislative judgment for Congress. It cannot be resolved, as the Second Circuit held, by having courts determine which statutes "sound in fraud" and which do not.

IV. SECTION 2462'S HISTORY DOES NOT SUPPORT THE GOVERNMENT'S CLAIM

Finally, the history of Section 2462 does not support, but rather refutes, the government's reading of the statute.

From the beginning of the Republic, Congress has limited the government's ability to impose a penalty, fine or forfeiture. The current version of Section 2462 traces back to a 1790 statute passed by the First Congress which made clear that the limitations period ran from the date the violation took place, and not later: no person should be "tried or punished" for "*any* fine or forfeiture" more than two years "from the time of committing the offense" "[*p*]*rovided*, That nothing herein contained shall extend to any person or persons

fleeing from justice." Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119 (emphasis added).[31]

In 1839, Congress enacted a version of the statute that was similar to both the 1790 law and the current Section 2462 in the sense of being a statute of general applicability. That law used the term "accrue" several times:

> That no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, *accruing* under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture *accrued*: *Provided*, The person of the offender or the property liable for such penalty or forfeiture shall, within the same period, be found within the United States; so that the proper process may be instituted and served against such person or property therefor.

Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 321, 322 (emphases added). A different section of the same law provided for venue "where such penalties or forfeitures have accrued." Act of Feb. 28, 1839, ch. 36, § 3, 5 Stat. 321, 322. At the time, a claim was understood to accrue when it could be sued on. *See Montgomery v.*

---

[31] Some courts have also traced Section 2462 to a 1799 act "to regulate the collection of duties on imports and tonnage." Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695-96; *3M*, 17 F.3d at 1458 n.7 (D.C. Cir. 1994). That act also made clear that the statute ran from the date "the penalty or forfeiture was incurred." Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695-96.

Hernandez, 25 U.S. (12 Wheat.) 129, 133-34 (1827); *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172, 181-82 (1830); *Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838); *Evans v. Gee*, 36 U.S. (11 Pet.) 80, 84 (1837); *Meredith v. United States*, 38 U.S. (13 Pet.) 486, 493-94 (1839); *accord* John Francis Kelly, *A Treatise On The Code Limitations of Actions Under All State Codes* 91 (1903) ("The cause of action accrues at the time the party is entitled to sue, demand relief, or make the entry."). Congress used "accrue" to mean where the claim arose—it would be nonsensical for venue to be assigned where the claim was discovered, or for the venue test to differ depending on whether the underlying claim was brought under a statute that sounded in fraud or not. The word "accrue" as used for the start date of the limitations period thus must have the same meaning. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (presumption that "identical words used in different parts of the same act are intended to have the same meaning." (citation and internal quotation marks omitted)).

Moreover, between the initial enactment of the first predecessor to Section 2462 in 1790 and the last enactment of the modern statute in 1948, the courts on any number of occasions held that the term "accrue" means what it says—when a right becomes full and complete—and rejected the argument that "accrue" in Section 2462 or any of its predecessors carries with it a discovery rule. *See, e.g.*, *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871) ("the 'forfeiture,' *accrued* when the offense was committed" (emphasis added)); *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944) ("the phrase 'time when the penalty or forfeiture *accrued*' refers merely to the time of the

commission of the offense or the doing of the act by which the penalty or forfeiture was incurred" (emphasis added)). Congress changed some of the language of Section 2462, but not the critical language regarding when the statute of limitations would start to run.[32] It is presumed to have been aware of those decisions and to have adopted them. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009).

In 1874, three years after the District Court for the Southern District of New York in *United States v. Maillard*, 26 F. Cas. at 1143, rejected inserting a discovery rule into the statute, Congress amended it to make clear that the five years from accrual rule was subject to a single exception—except as "otherwise specially provided." It left untouched the language of "accrued" and the parallel reference to a suit or prosecution "accruing" under the laws of the United States. Revised Statutes § 1047, 18 Stat. 193, 193 (1874). In 1948, having the opportunity to reconsider the statute in light of the Ninth Circuit's interpretation in *Smith v. United States*, 143 F.2d at 229, that a claim accrued when the offense was committed, Congress also did not change the critical language of Section 2462; it reaffirmed it. Just four years after *Smith*, Congress affirmatively reenacted that language in the current incarnation of Section 2462. Act of June 25, 1948, Pub. L. No. 80-7773, 61 Stat. 869, 974, *codified at* 28 U.S.C. § 2462. This current version of the statute measures the limitations period from when the claim

---

[32] No court held that any of the predecessor statutes incorporated a discovery rule or that the statute began to run on anything other than the date of the violation.

"first accrued"—language that at the time the statute was passed, the Supreme Court had recently interpreted to mean the "happening of the events which fix the defendant's liability." *Reading*, 271 U.S. at 64.

Finally, for decades thereafter, no court believed that Section 2462 itself incorporated a fraud discovery rule. Indeed, it was not until the past decade that the SEC advocated the position that Section 2462 itself incorporated a fraud discovery rule. Pet. App. 13a-18a. And, it was not until 2009 that a court of appeals even suggested—against the weight of other circuit decisions uniformly rejecting the fraud discovery rule—that a fraud discovery rule *may apply* to claims subject to Section 2462. *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009).[33] This settled understanding of Section 2462 by those subject to its limitations further confirms that Section 2462 does not incorporate a fraud discovery rule.

---

[33] It is notable that in *Koenig*, 557 F.3d at 739-40, the SEC argued and the court agreed that the individual defendant deliberately concealed his wrongdoing.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
Alida Y. Lasker
Katherine L. Wilson-Milne
Jared M. Gerber
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500
kathleen.massey@dechert.com

Counsel for Petitioners

RESPONDENT'S BRIEF

No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

MARK D. CAHN
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

HOPE HALL AUGUSTINI
DOMINICK V. FREDA
Senior Litigation Counsels

DAVID LISITZA
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MALCOLM L. STEWART
Deputy Solicitor General

JEFFREY B. WALL
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the five-year limitations period in 28 U.S.C. 2462 did not begin to run until the Securities and Exchange Commission discovered, or reasonably could have discovered, petitioners' alleged fraudulent scheme.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Summary of argument 8
Argument 12
I. The five-year limitations period in 28 U.S.C. 2462 did not begin to run until the Commission discovered, or with reasonable diligence could have discovered, petitioners' fraudulent scheme 12
A. In fraud cases, the discovery rule commences the running of Section 2462's limitations period upon actual or constructive discovery of the fraud 12
B. This case does not present the question of when Section 2462 begins to run in nonfraud cases 21
II. Petitioners' counterarguments lack merit 24
A. The application of a discovery rule in cases of fraud or concealment dates to the beginning of the Republic 24
1. Federal courts have consistently applied the fraud discovery rule both before and after Section 2462's enactment 24
2. The historical exception covers cases of fraud as well as cases of concealment 29
B. In fraud cases, the discovery rule is read into federal statutes of limitations unless Congress specifies otherwise 33
C. When Congress has explicitly addressed discovery in other federal limitations statutes, it has generally done so in order to expand or contract the traditional rule 38

Table of Contents—Continued: Page

D. The fraud discovery rule applies equally to the government as to private plaintiffs 41
E. The fraud discovery rule balances the need for repose against the need to prevent abuse of limitations statutes 46
F. The fraud discovery rule has proved to be judicially administrable for more than two centuries 48
Conclusion 52

TABLE OF AUTHORITIES

Cases:

Adams v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) 48
Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) ... 10
Amy v. *Watertown* (*No. 2*), 130 U.S. 320 (1889) 26, 41, 44
BP America Prod. Co. v. *Burton*, 549 U.S. 84 (2006) 42
Bailey v. *Glover*, 88 U.S. (21 Wall.) 342 (1875) ..... *passim*
Bay Area Laundry & Dry Cleaning Pension Trust Fund v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192 (1997) 14, 21
Beaubien v. *Beaubien*, 64 U.S. (23 How.) 190 (1860) 31
Booth v. *Warrington*, (1714) 2 Eng. Rep. 111 (H.L.) 24
Bowen v. *Massachusetts*, 487 U.S. 879 (1988) 27
Bree v. *Holbech*, (1781) 99 Eng. Rep. 415 (K.B.) 25
Cada v. *Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991) 34, 38
Carr v. *Hilton*, 5 F. Cas. 134 (C.C.D. Me. 1852) 31

Cases—Continued: Page

Case of Broderick's Will, 88 U.S. (21 Wall.) 503 (1875) 26, 44
Clark v. *Hougham*, (1823) 107 Eng. Rep. 339 (K.B.) 25
Clos v. *Corrections Corp. of Am.*, 597 F.3d 925 (8th Cir. 2010) 7
Corwin v. *Marney, Orton Invs.*, 843 F.2d 194 (5th Cir.), cert. denied, 488 U.S. 924 (1988) 51
Credit Suisse Secs. (USA) LLC v. *Simmonds*, 132 S. Ct. 1414 (2012) 31, 47
Dabney v. *Levy*, 191 F.2d 201 (2d Cir.), cert. denied, 342 U.S. 887 (1951) 34
Doe v. *United States*, 513 F.3d 1348 (Fed. Cir. 2008) 7
Exploration Co. v. *United States*, 247 U.S. 435 (1918) ..... *passim*
FEC v. *Williams*, 104 F.3d 237 (9th Cir. 1996), cert. denied, 522 U.S. 1015 (1997) 22
Federal Home Mortg. Corp. v. *Scottsdale Ins. Co.*, 316 F.3d 431 (3d Cir. 2003) 7
First Mass. Tpk. Corp. v. *Field*, 3 Mass. (1 Tyng) 201 (1807) 25
Fort Stewart Schs. v. *FLRA*, 495 U.S. 641 (1990) 41
Franconia Assocs. v. *United States*, 536 U.S. 129 (2002) 37
Glus v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) 13, 32, 43
Gomez-Perez v. *Potter*, 553 U.S. 474 (2008) 35
Granger v. *George*, (1826) 108 Eng. Rep. 56 (K.B.) 25

Cases—Continued: Page

Harrell v. *Kelly*, 13 S.C.L. (2 McCord) 426 (S.C. Const. Ct. App. 1823) 25
Holland v. *Florida*, 130 S. Ct. 2549 (2010) 35
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) ..... *passim*
Homer v. *Fish*, 1 Mass. (1 Pick.) 435 (1823) 31
Hovenden v. *Lord Annesley*, 2 Schoales & Lefroy (Ir. Ch. 1806) 32
Hudson v. *United States*, 522 U.S. 93 (1997) 47
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 18, 36, 42
India Breweries, Inc. v. *Miller Brewing Co.*, 612 F.3d 651 (7th Cir. 2010) 7
Jackson v. *Speer*, 974 F.2d 676 (5th Cir. 1992) 25, 38
Jackson's Assignees v. *Cutright*, 5 Va. (2 Munf.) 308 (1817) 25
Janus Capital Grp., Inc. v. *First Derivative Traders*, 131 S. Ct. 2296 (2011) 4, 5
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 35
Jones v. *Conoway*, 4 Yeates 109 (Pa. 1804) 25
Jones v. *McKennan*, 2 Del. Cas. 106 (Del. C.P. New Castle 1798) 25
Kane v. *Bloodgood*, 7 Johns. Ch. 90 (N.Y. Ch. 1823) 26
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 27
Kelly v. *Robinson*, 479 U.S. 36 (1986) 35
Kirby v. *Lake Shore & Mich. S. R.R.*, 120 U.S. 130 (1887) 14, 34, 38, 44
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 18, 50

Cases—Continued: Page

Merck & Co., Inc. v. *Reynolds*, 130 S. Ct. 1784 (2010) ..... *passim*
Moore v. *Greene*, 60 U.S. (19 How.) 69 (1856) 26
Prevost v. *Gratz*, 19 U.S. (6 Wheat.) 481 (1821) 47
Purdy v. *Zeldes*, 337 F.3d 253 (2d Cir. 2003) 7
Riddell v. *Riddell Wash. Corp.*, 866 F.2d 1480 (D.C. Cir. 1989) 29
Rosenthal v. *Walker*, 111 U.S. 185 (1884) 16, 34, 37
Rotella v. *Wood*, 528 U.S. 549 (2000) 45, 46
SEC v. *Bartek*, No. 11-10594, 2012 WL 3205446 (5th Cir. Aug. 7, 2012) 24
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 2, 43
SEC v. *Cuban*, 620 F.3d 551 (5th Cir. 2010) 51
SEC v. *Koenig*, 557 F.3d 736 (7th Cir. 2009) ..... *passim*
SEC v. *Tambone*:
550 F.3d 106 (2008) 9, 23, 32, 49
573 F.3d 54 (2009) 23
597 F.3d 436 (2010) 23
Schindler Elevator Corp. v. *United States ex rel. Kirk*, 131 S. Ct. 1885 (2011) 4
Shelby's Heirs v. *Shelby*, 3 Tenn. (Cooke) 179 (1812) 25
Sherwood v. *Sutton*, 21 F. Cas. 1303 (C.C.N.H. 1828) 13, 14, 21, 25, 28, 38
Smith v. *United States*, 143 F.2d 228 (9th Cir.), cert. denied, 323 U.S. 729 (1944) 28
South Sea Co. v. *Wymondsell*, (1732) 24 Eng. Rep. 1004 (Ch.) 24
Stearns v. *Page*, 48 U.S. (7 How.) 819 (1849) 31

Cases—Continued: Page

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 18, 19, 21, 29, 45
Taylor v. *United States*, 44 U.S. (3 How.) 197 (1845) 47
Texas v. *Allan Constr. Co.*, 851 F.2d 1526 (5th Cir. 1988) 32
3M Co. (Minn. Mining. & Mfg.) v. *Browner*, 17 F.3d 1453 (D.C. Cir. 1994) 22, 23, 36
United States v. *Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985) 22
United States v. *Hoar*, 26 F. Cas. 329 (1821) (No. 15,373) 45
United States v. *Maillard*, 26 F. Cas. 1140 (S.D.N.Y. 1871) 28
United States v. *Minor*, 114 U.S. 233 (1885) 42, 45
United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 36
United States v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954) 22
Urie v. *Thompson*, 337 U.S. 163 (1949) 45
Way v. *Cutting*, 20 N.H. 187 (1849) 19, 31
Willison v. *Watkins*, 28 U.S. (3 Pet.) 43 (1830) 9, 26, 27, 29

Statutes:

Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119 27
Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322 27
Act of Mar. 3, 1891, ch. 561, § 8, 26 Stat. 1099 16
Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 974 (28 U.S.C. 2462) 27

Statutes—Continued: Page

Bankruptcy Act of Mar. 2, 1867, ch. 176, § 2, 14 Stat. 518 15
Federal Farm Loan Act, 12 U.S.C. 812 (1946) 16
Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* 2
15 U.S.C. 80b-6(1) 2, 6, 20, 49
15 U.S.C. 80b-6(2) 2, 6, 20, 49
15 U.S.C. 80b-9(d) 3
15 U.S.C. 80b-9(e)(1) 47
15 U.S.C. 80b-9(e)(2)(A) 51
Rev. Stat. § 1047, 18 Stat. 193 (1874) 27
Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. 101-429, 104 Stat. 931 (15 U.S.C. 78 note) 3
Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.* 22
15 U.S.C. 77t(d) (2000) 47
15 U.S.C. 77www(a) (2000) 40
15 U.S.C. 78r (2000) 40
15 U.S.C. 78u(d)(3) (2000) 47
15 U.S.C. 78u-6(h)(B)(1)(iii)(I)(bb) (Supp. V 2011) 39
15 U.S.C. 1679i 41
19 U.S.C. 1621 40
19 U.S.C. 1641(d)(4) 41
21 U.S.C. 335b(b)(3)(B) 40
26 U.S.C. 7431(d) 39
28 U.S.C. 1658(b) 40, 45
28 U.S.C. 1658(b)(1) 15

Statutes—Continued: Page

28 U.S.C. 1658(b)(2) 15
28 U.S.C. 2415(a) 39
28 U.S.C. 2415(b) 39
28 U.S.C. 2416(c) 39
28 U.S.C. 2462 ..... *passim*
21 Jac. I. ch. 16, §§ II, VII (1623) 24

Miscellaneous:

1 Joseph K. Angell & John Wilder May, *A Treatise on the Limitations of Actions at Law and Suits in Equity and Admiralty* (4th ed., rev. & enl. 1861) 26
4 Matthew Bacon, *A New Abridgment of the Law* (5th ed. 1798) 26
John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875 (1933) 31, 32, 33
1 Isaac Espinasse, *A Digest of the Law of Actions at Nisi Prius* (1791) 26
Restatement (Second) of Torts (1976) 44
S. Rep. No. 337, 101st Cong., 2d Sess. (1990):
p. 6 3
p. 10 10

In the Supreme Court of the United States

No. 11-1274

MARC J. GABELLI AND BRUCE ALPERT, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 653 F.3d 49. The opinion of the district court (Pet. App. 26a-51a) is not reported but is available at 2010 WL 1253603.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2011. A petition for rehearing was denied on November 22, 2011 (Pet. App. 52a-53a). On February 10, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 22, 2012. On March 7, 2012, Justice Ginsburg further extended the time to April 20, 2012, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Investment Advisers Act of 1940 (Advisers Act or Act), 15 U.S.C. 80b-1 *et seq.*, "was the last in a series of Acts designed to eliminate certain abuses in the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963); see *id.* at 186-187 (noting that the Act is part of a comprehensive statutory scheme enacted by Congress to assure that "the highest ethical standards prevail in every facet of the securities industry") (internal quotation marks omitted). The Act reflects Congress's judgment that an investment adviser has "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients." *Id.* at 194 (internal quotation marks omitted). The Act is therefore designed "to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." *Id.* at 191-192.

To that end, the Act makes it unlawful for any adviser to "employ any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. 80b-6(1). The Act also prohibits an adviser from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. 80b-6(2). The "fundamental purpose" of those provisions is to ensure that investment advisers give "full disclosure" to their clients regarding the management of their investments. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 186. The Securities and Exchange Commission (SEC or Commission) may bring civil enforcement actions against investment advisers, or persons associated with them, who

violate any of the provisions of the Act or who aid and abet such violations. 15 U.S.C. 80b-9(d).

Before 1990, the Commission's primary remedies in such enforcement actions were injunctive relief and disgorgement of violators' ill-gotten gains. In 1990, Congress authorized the SEC to seek civil monetary penalties against violators of the federal securities laws, including the Advisers Act. See Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act), Pub. L. No. 101-429, 104 Stat. 931 (15 U.S.C. 78a note); see also S. Rep. No. 337, 101st Cong., 2d Sess. 10 (1990) (explaining that civil penalties were necessary "to increase deterrence and help maintain public confidence in the integrity of the markets"); *ibid.* ("Since disgorgement merely requires the return of wrongfully obtained profits, it does not impose any meaningful economic cost on the law violator.").

Neither the Advisers Act nor the Remedies Act specifies a statute of limitations for an enforcement action in which the Commission seeks monetary penalties from an investment adviser or associated person. The timeliness of such actions is therefore governed by 28 U.S.C. 2462, which states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

2. a. This case concerns a type of "market timing" of mutual funds known as "time-zone arbitrage."[1] As a general rule, mutual funds are priced once a day, usually at 4 p.m. Eastern Time when the New York Stock Exchange closes. That price, called the fund's net asset value (NAV), reflects the closing prices of the securities held by the fund. If one of those securities is traded on an overseas market, however, the closing price incorporated into the fund's NAV can be based on stale information. For instance, if a United States mutual fund holds stock in a Japanese company that is traded on the Tokyo Stock Exchange (TSE)—which closes at 2 a.m. Eastern Time—the fund's NAV for each day incorporates the stock's Japanese closing price from 14 hours earlier. Positive market movements during the New York trading day, which will later cause the TSE price to rise when the TSE opens at 8 p.m. Eastern Time, will not be reflected in the fund's late-afternoon NAV. See J.A. 78-79.

"Market timers" attempt to exploit that type of pricing inefficiency by buying or selling a mutual fund's shares based on events that they do not expect to be reflected in the fund's NAV. Market timers then reverse their positions for a profit the next day. See *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2300 n.1 (2011) ("[A] market-timing investor could buy shares of a mutual fund at the artificially low NAV and sell the next day when the NAV corrects itself upward."). That practice harms long-term

---

[1] This case arises on petitioners' motion to dismiss the Commission's complaint. See Pet. App. 51a. The factual statements in this brief are drawn from that complaint (which appears at J.A. 72-95) and are taken as true at this stage of the proceedings. See, *e.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.2 (2011).

mutual fund shareholders by capturing an arbitrage profit that comes dollar-for-dollar out of other shareholders' pockets. See *id.* at 2300 (observing that market timing "harms other investors in the mutual fund").

b. Gabelli Funds, LLC (Gabelli Funds) is an investment adviser, within the meaning of the Act, to a mutual fund called Gabelli Global Growth Fund (GGGF). See Pet. 6; J.A. 77. During the relevant period, petitioner Bruce Alpert was the Chief Operating Officer of Gabelli Funds and was responsible for, *inter alia*, monitoring trading in GGGF to eliminate market timing. See J.A. 76-77, 84, 86, 88-89. Petitioner Marc Gabelli was the portfolio manager for GGGF and also managed other affiliated funds. See J.A. 76.

In April 2008, the Commission brought a civil enforcement action against petitioners. The Commission alleged that petitioners had secretly permitted one of GGGF's investors—Headstart Advisers, Ltd. (Headstart)—to market time the mutual fund, in return for Headstart's investment in another fund managed by Gabelli. See J.A. 72-75, 80-85. According to the SEC, at the same time that petitioners had allowed Headstart to market time the fund, they had prohibited other investors from doing the same. See J.A. 74, 83-85. The Commission alleged that, as a result of its privileged position, Headstart had earned returns of between 73 and 185% on its investments (for total profits of approximately $9.7 million), while long-term investors had lost an average of 24% on their investments. See J.A. 73, 87.

The Commission further alleged that petitioners had failed to disclose Headstart's market timing (or their quid pro quo agreement with the market timer) to GGGF's board of directors and other investors, but instead had falsely represented that they were taking nec-

essary steps to eliminate market timing. See J.A. 74-75, 86, 88-89. The SEC alleged that, by failing to disclose the market timing arrangement and by falsely representing that Gabelli Funds was attempting to eliminate market timing in GGGF, petitioners had aided and abetted Gabelli Funds in violating the antifraud provisions of the Advisers Act, 15 U.S.C. 80b-6(1) and (2). See J.A. 92-93. As remedies for petitioners' violations, the Commission sought injunctive relief, disgorgement of their gains, and civil monetary penalties. See J.A. 93-94.[2]

3. The district court granted in part and denied in part petitioners' motion to dismiss the complaint. Pet. App. 26a-51a. As relevant here, the court held that most of the Commission's claims for civil penalties were barred by the five-year limitations period in 28 U.S.C. 2462. Pet. App. 34a-39a. The court reasoned that the SEC's claims against petitioners had "first accrued" for purposes of Section 2462 when petitioners committed their various fraudulent acts, not when the Commission discovered or reasonably could have discovered petitioners' fraud. *Id.* at 34a, 36a. Because most of petitioners' fraudulent acts had occurred more than five years before the Commission filed its complaint in April 2008, the court concluded that the SEC was foreclosed from

---

[2] On the same day the Commission filed its complaint in this case, Gabelli Funds entered into a settlement in which it agreed to cease and desist from violating the relevant provisions of the Advisers Act. Gabelli Funds also agreed to pay disgorgement of $9.7 million, prejudgment interest of $1.3 million, and a civil penalty of $5 million. As part of the settlement, Gabelli Funds neither admitted nor denied the Commission's allegations in this case. See *In the Matter of Gabelli Funds LLC*, No. 3-13019, Order (Apr. 24, 2008), http://www.sec.gov/litigation/admin/2008/ia-2727.pdf.

seeking civil penalties for the bulk of its claims. *Id.* at 37a-38a.[3]

4. The court of appeals reversed. Pet. App. 1a-23a. As relevant here, the court noted that the SEC had brought its claims under "the antifraud provisions" of the Advisers Act and had alleged that petitioners "aided and abetted Gabelli Funds' fraudulent scheme." *Id.* at 19a. The court held that, because the Commission's claims are based on fraud, they are subject to a "discovery rule" that prevents the applicable limitations period from beginning to run until the fraud claim "is discovered, or could have been discovered with reasonable diligence, by the plaintiff." *Id.* at 18a; see *Merck & Co., Inc.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010).

The court of appeals rejected petitioners' argument that the discovery rule was inapplicable because the Commission had failed to plead any affirmative acts by petitioners to conceal their fraud. Pet. App. 18a-20a.

---

[3] After the district court dismissed the bulk of the Commission's claims, the SEC conditionally dismissed its remaining claim for disgorgement. The SEC agreed to reassert that disgorgement claim only if the district court's ruling on the motion to dismiss was reversed on appeal and the Commission was permitted to proceed with its other claims. See J.A. 105-106. Some courts of appeals have held that this type of conditional dismissal does not produce a final, appealable judgment. Compare *Clos* v. *Corrections Corp. of Am.*, 597 F.3d 925, 928 (8th Cir. 2010); *Federal Home Loan Mortg. Corp.* v. *Scottsdale Ins. Co.*, 316 F.3d 431, 440 (3d Cir. 2003), with *Doe* v. *United States*, 513 F.3d 1348, 1354 (Fed. Cir. 2008); *Purdy* v. *Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003). Here, however, the Commission has been willing to abandon its disgorgement claim altogether in order to ensure that the judgment is appealable as to the other claims. See 1:08-CV-3868, Docket entry No. 36, at 2-3 (S.D.N.Y. June 15, 2010). In that circumstance, courts have agreed that a judgment is appealable. See, *e.g.*, *India Breweries, Inc.* v. *Miller Brewing Co.*, 612 F.3d 651, 657-658 (7th Cir. 2010); *Federal Home Loan Mortg. Corp.*, 316 F.3d at 440.

That argument, the court stated, conflates the discovery rule with the doctrine of fraudulent concealment, which prevents a limitations period from running when a defendant has taken steps to conceal his allegedly wrongful conduct. *Id.* at 18a-19a. Petitioners also contended that, "even if the discovery rule applies" to this case, the civil-penalty claims were time-barred because the SEC could have discovered the relevant facts earlier if it had exercised reasonable diligence. *Id.* at 21a. The court rejected that argument as "premature" at the motion-to-dismiss stage of the case, explaining that expiration of the limitations period is an affirmative defense and that the burden is therefore on petitioners to plead and prove the Commission's lack of reasonable diligence. *Ibid.* The court of appeals concluded that, because "the complaint expressly alleges that the [Commission] first discovered the facts of [petitioners'] fraudulent scheme in late 2003," less than five years before the complaint was filed in April 2008, the Commission's "civil penalties claims [are] not clearly time-barred." *Ibid.*

SUMMARY OF ARGUMENT

I. A. Section 2462 of Title 28 provides that an action for the enforcement of any civil penalty "shall not be entertained unless commenced within five years from the date when the claim first accrued." This Court has repeatedly held that, unless Congress specifies a different rule, the limitations period in a suit for fraud does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying his claim. Whether that doctrine is labeled as one of claim accrual or equitable tolling, the Court has never questioned that the discovery rule delays the running of an applicable limitations period in

cases of fraud. Here, the Commission contends that petitioners engaged in a fraudulent scheme that violated the antifraud provisions of the Advisers Act. The court of appeals therefore correctly held that the Commission was required to bring its suit within five years after it discovered, or with reasonable diligence could have discovered, petitioners' fraudulent scheme.

B. Petitioners invoke the general rule that a claim accrues when a plaintiff has the right to bring suit. But the government has not contended, and the court below did not hold, that *all* claims for civil penalties under Section 2462 are subject to a discovery rule. Rather, the government has argued, and the court of appeals agreed, that a discovery rule applies when the government seeks civil penalties for claims based on *fraud*. Like the court below, the First and Seventh Circuits have held that, in fraud cases brought by the Commission seeking civil penalties, Section 2462's five-year limitations period does not begin to run until the Commission knew or should have known the relevant facts. See *SEC* v. *Koenig*, 557 F.3d 736, 739-740 (7th Cir. 2009) (Easterbrook, C.J.); *SEC* v. *Tambone*, 550 F.3d 106, 148-149 (1st Cir. 2008).

II. Petitioners' various counterarguments do not withstand scrutiny.

A. The application of a discovery rule in cases of fraud or concealment dates to the earliest days of the Republic. See, *e.g.*, *Willison* v. *Watkins*, 28 U.S. (3 Pet.) 43, 52 (1830) (acknowledging the "well settled and unquestioned rule[] in all courts of law and equity" that the statute of limitations "does not run until the discovery of the fraud") (internal quotation marks omitted). For nearly 175 years, Congress has relied on that settled

understanding in enacting, amending, and codifying Section 2462.

B. The discovery rule has long been understood as a background principle that presumptively governs the application of federal limitations statutes unless Congress specifies otherwise. The doctrine's applicability therefore does not depend on express language incorporating it into a federal limitations statute. The crucial question with respect to the discovery rule, as with respect to other equitable doctrines like forfeiture or waiver, is whether Congress has clearly displaced the usual rule that limitations periods in fraud cases are triggered by actual or constructive discovery. It has not: nothing in the text of Section 2462 clearly displaces the fraud discovery rule.

C. When Congress has explicitly addressed discovery in other federal limitations statutes, it has generally done so not to codify the traditional fraud discovery rule, but to alter the rule's usual operation. On rare occasions, Congress has expressly codified the traditional fraud discovery rule, perhaps "to remove any doubt" that the rule applies in those contexts. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008). Regardless, Congress's occasional express endorsement of the fraud discovery rule does not render the rule inapplicable to statutes where it is neither explicitly incorporated nor explicitly displaced.

D. This Court has long held that the fraud discovery rule applies equally when the government is the plaintiff. See *Exploration Co.* v. *United States*, 247 U.S. 435, 449 (1918). That is because equity's primary justification for the fraud discovery rule does not center on the injury suffered by the plaintiff from the delay, but on the defendant's misconduct in causing that delay. That

equitable justification distinguishes cases of fraud or concealment from other cases in which a plaintiff is reasonably unaware of her cause of action, and it is as applicable to government enforcement actions as to private suits.

E. The traditional fraud discovery rule balances the basic policies of all limitations provisions (like repose) against competing values, particularly the venerable equitable principle that a person should not profit from her own wrong. Its core justification is that defendants are not *entitled* to repose when their own deceptive conduct has effectively foreclosed potential plaintiffs from seeking such redress. Petitioners rely on a presumption against perpetual penalties that does not apply in the context of a civil remedy, but in any event Section 2462's five-year time limit actually prevents the imposition of perpetual penalties. To the extent petitioners remain subject to liability, that results not from the statute but from their own misconduct.

F. Finally, petitioners' policy arguments are unpersuasive. For centuries, courts have applied the traditional fraud discovery rule, and they have not found it difficult to determine when a cause of action is based on fraud or when a plaintiff (including a government agency) actually or constructively discovered that fraud. Although the Commission has tools at its disposal to investigate fraud, that does not place the SEC on notice of the need to exercise those powers in a particular case when a defendant's fraud remains concealed. Petitioners' approach unrealistically envisions that the Commission (and other federal agencies) could constantly monitor every regulated entity and transaction for any hint of hidden fraud, which in any event would only increase the regulatory burden on nonculpable entities. Nor is it

realistic to think that the court of appeals' approach will seriously weaken the Commission's incentives to diligently investigate and pursue fraud claims, as it did in this case.

ARGUMENT

I. THE FIVE-YEAR LIMITATIONS PERIOD IN 28 U.S.C. 2462 DID NOT BEGIN TO RUN UNTIL THE COMMISSION DISCOVERED, OR WITH REASONABLE DILIGENCE COULD HAVE DISCOVERED, PETITIONERS' FRAUDULENT SCHEME

In arguing that the SEC's suit was untimely, petitioners invoke the general rule that a claim accrues when a plaintiff has the right to bring suit. That argument lacks merit because it ignores the distinct rule that has long governed the commencement of limitations periods in *fraud* cases. This Court has repeatedly held that, unless Congress specifies a different rule, the limitations period in a suit for fraud does not begin to run until the plaintiff actually or constructively discovers the facts underlying his claim. The SEC's complaint in this case therefore was timely unless petitioners can establish on remand that the Commission discovered the facts underlying its claim, or could have discovered those facts by exercising reasonable diligence, more than five years before the suit was filed.

A. In Fraud Cases, The Discovery Rule Commences The Running Of Section 2462's Limitations Period Upon Actual Or Constructive Discovery Of The Fraud

1. Section 2462 of Title 28 provides that an action for the enforcement of any civil penalty "shall not be entertained unless commenced within five years from the date when the claim first accrued." Petitioners contend (Br.

15-16) that the Commission's civil-penalty claims against them "first accrued" when petitioners' allegedly unlawful acts occurred, regardless of when the Commission discovered (or reasonably could have discovered) petitioners' fraudulent scheme. That argument lacks merit. This Court has consistently recognized that, unless Congress specifies a different rule, the limitations period *in a suit for fraud* does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying his claim.

That rule derives from the equitable maxim that a party should not be permitted to benefit from its own misconduct. See, *e.g.*, *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-233 (1959) ("[W]e need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.") (footnote omitted). This Court has long held as a matter of equity that a defendant cannot use his own misconduct as a defense, including by unfairly relying on a statute of limitations. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-397 (1946) ("Equity * * * bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud."); *Exploration Co.* v. *United States*, 247 U.S. 435, 445-446 (1918); *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348-349 (1875); cf. *Sherwood* v. *Sutton*, 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) (Story, J.) (No. 12,782).

Most recently, in *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784 (2010), the Court explained that "in the statute of limitations context, the word 'discovery' is often used as a term of art in connection with the 'discovery rule,' a

doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it." *Id.* at 1793. That doctrine "arose in fraud cases as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action.'" *Ibid.* (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997)). The exception reflects the Court's long-standing "recogni[tion] that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Ibid.* Absent an exception for fraud cases, "'the law which was designed to prevent fraud' could become 'the means by which it is made successful and secure.'" *Id.* at 1793-1794 (quoting *Bailey*, 88 U.S. (21 Wall.) at 349); see *Sherwood*, 21 F. Cas. at 1307.

2. When a particular statute (like Section 2462) makes the "accru[al]" of a claim the event that triggers the limitations period, the *Merck* Court's description of the discovery rule indicates that a fraud claim does not "accrue" until the plaintiff has (actually or constructively) discovered the relevant facts. Indeed, the decision below represents a straightforward application of the equitable principles discussed in *Merck*. When a plaintiff's claim is for fraud, and the applicable statute of limitations runs from the accrual of the plaintiff's cause of action, the discovery rule "regard[s] the cause of action as having accrued at the time the fraud was or should have been discovered." 130 S. Ct. at 1794 (quoting *Kirby* v. *Lake Shore & Mich. S. R.R.*, 120 U.S. 130, 138 (1887) (brackets in original)); see *Kirby*, 120 U.S. at 138 (noting that "[i]t is an inflexible rule" in federal

courts to delay the accrual of causes of action in fraud cases). That reasoning resolves this case.

As petitioners correctly observe (Br. 29-30), *Merck* involved a statute, 28 U.S.C. 1658(b), that contains an express discovery rule. Section 1658(b) requires private securities actions to be brought "not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." But in construing what it means to "discover[]" the relevant facts (*i.e.*, whether that term encompasses constructive as well as actual discovery), this Court relied heavily on the common-law background principles that generally govern the application of limitations provisions to fraud claims. See 130 S. Ct. at 1793-1796. Indeed, the Court discussed those background principles to explain that Congress had codified one of them (*i.e.*, constructive discovery) in Section 1658(b)(1). See *id.* at 1794. The Court's discussion is equally relevant here. Although the question in this case is whether the discovery rule delays a claim's accrual in fraud cases, rather than whether constructive discovery puts an end to that delay, the Court's historical analysis in *Merck* directly answers both questions.

Petitioners suggest (Br. 29) that this case is different because, unlike the statute at issue in *Merck*, the limitations period in Section 2462 runs from a claim's "accru[al]." But that only makes this case an easy one. In *Bailey*, the bankruptcy statute of limitations at issue required certain suits to be brought "within two years from the time [when] the cause of action *accrued*." 88 U.S. (21 Wall.) at 344 (quoting Bankruptcy Act of Mar. 2, 1867, ch. 176, § 2, 14 Stat. 518) (emphasis omitted). Surveying decisions from both English and American courts, the Court observed that "the decided weight

of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Id.* at 348; see *id.* at 348 n.*; *Rosenthal* v. *Walker*, 111 U.S. 185, 189 (1884) (applying the fraud discovery rule to a similar successor provision). The Court's decisions thus make particularly clear how the fraud discovery rule operates when the relevant statute of limitations runs from the "accrual" of a claim.

3. The fraud discovery rule also applies when the relevant statute specifies some event other than the accrual of the claim as the point at which the limitations period commences. In *Exploration Co.*, for example, the federal limitations period at issue required "[t]hat suits by the United States to vacate and annul any patent * * * shall only be brought within six years after the date of issuance of such patents." 247 U.S. at 445 (quoting Act of Mar. 3, 1891, ch. 561, § 8, 26 Stat. 1099). The six-year limitations period thus ran from the date on which a patent was issued—not the date on which a claim to annul the patent accrued. The Court nevertheless saw "no good reason" not to apply "the rule, now almost universal, that statutes of limitations to set aside fraudulent transactions shall not begin to run until the discovery of the fraud." *Id.* at 449.

In *Holmberg*, the Court considered an action under the Federal Farm Loan Act, 12 U.S.C. 812 (1946), to recover for a bank's liability against a shareholder who had concealed his ownership of the bank's stock. See 327 U.S. at 393. Because the Act did not provide a federal limitations period, the suit was governed by a ten-year state limitations period (the Court's opinion does

not make clear what event that state law specified as the trigger for the ten-year period). See *id.* at 393-394. The plaintiffs' action had been dismissed because it was brought more than ten years after the shareholder became liable under the Act, even though plaintiffs had filed suit only a year after learning the shareholder's concealed identity. See *id.* at 393. In holding that the suit was timely, this Court recognized that it had "long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Id.* at 397 (quoting *Bailey*, 88 U.S. (21 Wall.) at 348).

The Court's reasoning in cases like *Bailey*, *Exploration Co.*, and *Holmberg* does not depend on whether a limitations period commences upon a claim's "accrual" or upon some other event. To the contrary, the Court in *Holmberg* explained that the fraud discovery rule is an "equitable doctrine [that] is read into every federal statute of limitation." 327 U.S. at 397; see *ibid.* ("If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit * * *, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception * * * which is the basis of this suit."); see also *Exploration Co.*, 247 U.S. at 449 ("When Congress passed the [limitations period] in question the rule of *Bailey* v. *Glover* was the established doctrine of this court. [The statute] was presumably enacted with the ruling of that case in mind."). Thus, whatever the event

that normally commences the running of a limitations period, in a fraud case that period does not begin to run until the relevant information was discovered or could have been discovered by a reasonably diligent plaintiff.

4. The Court has sometimes referred to the fraud discovery rule as a doctrine of tolling rather than of accrual. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001) (*TRW*) (explaining that "equity tolls the statute of limitations in cases of fraud or concealment"); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991) (*Lampf*) (stating that the Court in *Bailey* and *Holmberg* had applied an "equitable tolling doctrine"); cf. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (identifying, as one circumstance where "equitable tolling" of limitations periods has been approved, the situation "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). But regardless of whether the discovery rule is labeled as one of tolling or accrual, the Court has never questioned that the doctrine delays the running of a limitations period in cases of fraud.

In *TRW*, the Court observed that "*Holmberg* * * * stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment; it does not establish a general presumption applicable across all contexts." 534 U.S. at 27. The Court declined to decide whether to adopt a broader rule that would allow tolling whenever a diligent potential plaintiff is unaware, for reasons *other than* his adversary's fraud or concealment, of the facts underlying his cause of action. See *id.* at 27-28. Concurring in the judgment, Justice Scalia, joined by Justice Thomas, would have addressed the broader question and reaffirmed "the traditional rule" that "[a]bsent other indication, a statute of limitations

begins to run at the time the plaintiff has the right to apply to the court for relief." *Id.* at 37 (internal quotation marks omitted). Justice Scalia expressly noted, however, this Court's "recognition of the historical exception for suits based on fraud, *e.g.*, *Bailey* v. *Glover*." *Ibid.* Accordingly, whether or not the discovery rule applies beyond cases of fraud or concealment, no Member of this Court has questioned its application to fraud cases.

There are sound historical and equitable reasons for this Court's distinct treatment of cases involving fraud or concealment. To be sure, a court's refusal to apply a discovery rule in other circumstances may effectively prevent some reasonably diligent plaintiffs from obtaining redress for actionable wrongs. That result is particularly egregious, however, when the plaintiff's ignorance of his cause of action is attributable to the defendant's deception, because such cases implicate the equitable principle that a person should not profit from his own wrong. See, *e.g.*, *Way* v. *Cutting*, 20 N.H. 187, 190 (1849) ("The general principle of natural justice and of positive law that precludes a party from deriving a benefit from his own wrong, has from an early period been applied by courts, both of law and of equity, to the construction of the statutes of limitation.").

5. The timeliness of the Commission's complaint in this case does not depend on whether the fraud discovery rule is used to determine when the Commission's claims accrued or instead is treated as a ground for tolling the applicable limitations period. The Seventh Circuit made precisely that point in a similar fraud case brought by the Commission for civil penalties. See *SEC* v. *Koenig*, 557 F.3d 736 (2009) (Easterbrook, C.J.). The court explained that it did not need to decide "when a

'claim accrues' for the purpose of [Section] 2462 generally, because the nineteenth century recognized a special rule for fraud, a concealed wrong." *Id.* at 739. That doctrine, the court noted, "is apt to be called equitable tolling." *Ibid.* The court observed, however, that it is "unimportant in practice" "[w]hether a court says that a claim for fraud accrues only on its discovery (more precisely, when it *could have been* discovered by a person exercising reasonable diligence) or instead says that the claim accrues with the wrong, but that the statute of limitations is tolled until the fraud's discovery." *Ibid.* "Either way," the court explained, "a victim of fraud has the full time from the date that the wrong came to light, or would have done had diligence been employed." *Ibid.*

Like the Seventh Circuit in *Koenig*, the court of appeals correctly applied the fraud discovery rule in this case. The Commission alleges that petitioners' conduct aided and abetted violations of the antifraud provisions of the Advisers Act, 15 U.S.C. 80b-6(1) and (2). Those provisions make it unlawful for any adviser "to employ any device, scheme, or artifice to defraud any client or prospective client," 15 U.S.C. 80b-6(1), or "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," 15 U.S.C. 80b-6(2). The court of appeals therefore held that, because "the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme, * * * the discovery rule defines when the claim accrues." Pet. App. 19a.

Consistent with the terminology this Court used in *Merck*, see 130 S. Ct. at 1794, the court below thus treated the fraud discovery rule as a means of identifying a fraud claim's accrual date, rather than as a ground

for tolling Section 2462's five-year limitations period. As the Seventh Circuit recognized in *Koenig*, however, that terminological choice is "unimportant in practice." 557 F.3d at 739; cf. *Sherwood*, 21 F. Cas. at 1305 (noting the existence of "some diversity of judgment" as to whether the fraud discovery rule was "an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud"). Either way, the Commission was required to bring its suit within five years after it discovered, or with reasonable diligence could have discovered, petitioners' fraudulent scheme.

B. This Case Does Not Present The Question Of When Section 2462 Begins To Run In Nonfraud Cases

Petitioners argue that the Commission's civil penalty claims accrued at the time petitioners committed their fraud because "a claim accrues when it arises and the plaintiff has the *right* to sue." Br. 15; see Br. 12-16. As the Court recognized in *Merck*, that is the "general limitations rule": "a cause of action accrues once a plaintiff has a 'complete and present cause of action.'" 130 S. Ct. at 1793 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund*, 522 U.S. at 201). But the government has not contended, and the court below did not hold, that *all* claims for civil penalties under Section 2462 are subject to a discovery rule. Rather, the government has argued, and the court of appeals agreed, that a discovery rule applies when the government seeks civil penalties based on claims sounding in *fraud*. See Pet. App. 19a-20a. And as the *Merck* Court explained, the discovery rule "arose in fraud cases as an exception to the general limitations rule." 130 S. Ct. at 1793; see *TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judg-

ment) (noting "the historical exception for suits based on fraud").

All of the authorities on which petitioners rely (Br. 12-16 & nn.9-12) address the accrual of nonfraud claims, *i.e.*, claims presumptively subject to the general rule. Those authorities therefore do not undermine the rationale on which the court below decided this case. At the certiorari stage, petitioners contended (Pet. 13-19) that the decision below was the subject of a circuit conflict because four courts of appeals had held that a claim "accrue[s]" for purposes of Section 2462 at the time of the underlying violation. As the government explained (Br. in Opp. 19-20), however, none of those decisions even discussed, let alone rejected, application of the discovery rule to delay the accrual of a fraud claim for purposes of Section 2462. Petitioners no longer rely on (or even cite) three of those decisions. See *FEC* v. *Williams*, 104 F.3d 237 (9th Cir. 1996), cert. denied, 522 U.S. 1015 (1997); *United States* v. *Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985); *United States* v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954).

Petitioners continue to argue that the court in the fourth case "reject[ed] application of the discovery rule to Section 2462," Br. 31, but in that case the underlying violation had nothing to do with fraud. See *3M Co. (Minn. Mining & Mfg.)* v. *Browner*, 17 F.3d 1453, 1460-1463 (D.C. Cir. 1994) (defendant imported chemicals in violation of the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*). *3M Co.* thus stands for the unremarkable proposition that a cause of action often accrues at the time of a defendant's unlawful conduct. See Pet. App. 20a n.4 (noting that petitioners' reliance below on *3M Co.* was "misplaced" because that case "did not involve fraud claims"); *Koenig*, 557 F.3d at 739 (distin-

guishing *3M Co.* on the same ground). Moreover, the court in *3M Co.* recognized that concealment suspends the running of Section 2462's limitations period. See 17 F.3d at 1461 n.15.

Like the court below, the First and Seventh Circuits have squarely held that, in fraud cases brought by the Commission seeking civil penalties, Section 2462's five-year limitations period does not begin to run until the Commission knew or should have known the relevant facts. See Br. in Opp. 18; see also *Koenig*, 557 F.3d at 739-740; *SEC* v. *Tambone*, 550 F.3d 106, 148-149 (1st Cir. 2008).[4] Petitioners acknowledge (Br. 53) that the court in *Koenig* so held, and they do not discuss *Tambone*.[5] In a recent unpublished opinion, the Fifth Circuit declined to apply the discovery rule in a fraud case brought by the Commission seeking civil penalties.

---

[4] The First Circuit granted en banc review in *Tambone* and accordingly withdrew the panel opinion, but the en banc court limited its review to a different issue in the case. See *SEC* v. *Tambone*, 573 F.3d 54 (2009). The en banc court's subsequent opinion was confined to that issue, and the court expressly reinstated the panel's conclusion that an enforcement action by the Commission is timely if it is brought within five years of when the Commission discovered, or reasonably could have discovered, a defendant's fraud. See *SEC* v. *Tambone*, 597 F.3d 436, 450 (1st Cir. 2010).

[5] Petitioners suggest that in *Koenig*, "the individual defendant deliberately concealed his wrongdoing," Br. 53 n.33, but the defendant's fraud there was no more or less "conceal[ed]" than in this case. In *Koenig*, a corporate executive used various accounting methods to overstate the company's profits. See 557 F.3d at 737-739. The executive falsely told outside accountants that he would discontinue using those methods, see *id.* at 740, but that is not different from petitioners' false representation to directors and investors that they were attempting to eliminate market timing. In any event, nothing in the Seventh Circuit's decision rested on the fact that the defendant there misled outside accountants.

See *SEC* v. *Bartek*, No. 11-10594, 2012 WL 3205446, at *3-*6 (Aug. 7, 2012). For reasons explained below, the Fifth Circuit erred in interpreting this Court's decisions to hold that the discovery rule applies in a fraud case only if the defendant allegedly took additional steps to conceal his fraud. See *id.* at *4-*5; pp. 29-33, *infra*. This Court has long rejected precisely that argument.

II. PETITIONERS' COUNTERARGUMENTS LACK MERIT

Petitioners advance several arguments why the limitations period in 28 U.S.C. 2462 should have commenced to run before the Commission discovered, or reasonably could have discovered, petitioners' fraudulent scheme. None withstands scrutiny.

A. The Application Of A Discovery Rule In Cases Of Fraud Or Concealment Dates To The Beginning Of The Republic

1. Federal courts have consistently applied the fraud discovery rule both before and after Section 2462's enactment

a. Contrary to petitioners' contention (Br. 49-53), the government's position is deeply rooted in history. Although the Statute of James (the English predecessor to American statutes of limitations) lacked an express exception for fraud actions, see 21 Jac. I. ch. 16, §§ II, VII (1623), English courts sitting in equity suspended the statute's operation in cases of fraud. See, *e.g.*, *South Sea Co.* v. *Wymondsell*, (1732) 24 Eng. Rep. 1004, 1005 (Ch.) (observing that "a bill to be relieved against a fraud, was not within the statute of limitations"); *Booth* v. *Warrington*, (1714) 2 Eng. Rep. 111, 112 (H.L.) (affirming that "the plea of the statute of limitations ought not to avail [the defendant] any thing" in a claim for

fraud). English courts eventually recognized that this equitable exception could apply to actions at law as well. See, *e.g.*, *Granger* v. *George*, (1826) 108 Eng. Rep. 56, 56 (K.B.); *Clark* v. *Hougham*, (1823) 107 Eng. Rep. 339, 341 (K.B.); *Bree* v. *Holbech*, (1781) 99 Eng. Rep. 415, 416 (K.B.) (Lord Mansfield, C.J.).

Because "most, if not all[,] the statutes of limitations" enacted in the early days of the Republic "borrowed the language" of the Statute of James, "the expositions of the statute, which had been adopted in England, both at law and in equity, were well known to those, who framed our own." *Sherwood*, 21 F. Cas. at 1307 (Story, J.). It was therefore natural "that these expositions," including the fraud discovery rule, "were received as the true interpretation" of statutes of limitations by American courts during the early nineteenth century. *Ibid.*[6] Accordingly, treatises from both sides

---

[6] See, *e.g.*, *Harrell* v. *Kelly*, 13 S.C.L. (2 McCord) 426, 428 (S.C. Const. Ct. App. 1823) ("[I]f the plaintiff prosecute his claim within four years from the time the fraud is discovered, the case is not barred."); *Jackson's Assignees* v. *Cutright*, 5 Va. (2 Munf.) 308, 323 (1817) ("[W]here fraud has been committed, and *not discovered* by the party defrauded, the Act will not run; but it will run from the time when the fraud *was discovered*."); *Shelby's Heirs* v. *Shelby*, 3 Tenn. (Cooke) 179, 183 (1812) (acknowledging an "exception" to the statute of limitations if "the fraud was not * * * discovered until within three years previous to the institution of the suit"); *Jones* v. *Conoway*, 4 Yeates 109, 111 (Pa. 1804) ("Wherever there is a fraud, the statute of limitations is no plea, unless the fraud be discovered within the time."); *First Mass. Tpk. Corp.* v. *Field*, 3 Mass. (1 Tyng) 201, 207 (1807) ("The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action."); *Jones* v. *McKennan*, 2 Del. Cas. 106, 107 (Del. C.P. New Castle 1798) (agreeing with the plaintiff's argument that the limitations statute did not run "in case[s] of frauds").

of the Atlantic confirmed that if "the fraud was not discovered" within the limitations period, "the statute of limitations is not a good plea, unless the defendant denies the fraud, or avers, that the fraud, if any, was discovered [within the limitations period]." 4 Matthew Bacon, *A New Abridgment of the Law* 476 (5th ed. 1798); see 1 Isaac Espinasse, *A Digest of the Law of Actions at Nisi Prius* 162 (1791).

This Court likewise acknowledged the "well settled and unquestioned rule[] in all courts of law and equity" that the statute of limitations "does not run until the discovery of the fraud." *Willison* v. *Watkins*, 28 U.S. (3 Pet.) 43, 52-53 (1830) (quoting *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 122 (N.Y. Ch. 1823)). As the Court summarized, "[t]he courts of equity * * * from an early day, held that where one person has been injured by the fraud of another, and the facts constituting such fraud do not come to the knowledge of the person injured until some time afterward, the statute will not commence to run until the discovery of those facts, or until by reasonable diligence they might have been discovered." *Amy* v. *Watertown (No. 2)*, 130 U.S. 320, 324 (1889); see *Moore* v. *Greene*, 60 U.S. (19 How.) 69, 72 (1856) ("When fraud is alleged as a ground to set aside a title, the statute does not begin to run until the fraud is discovered."); 1 Joseph K. Angell & John Wilder May, *A Treatise on the Limitations of Actions at Law and Suits in Equity and Admiralty* 179-192 (4th ed., rev. & enl. 1861). Indeed, in language that remains directly relevant to this case, the Court explained that a "cause of action * * * is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." *Case of Broderick's Will*, 88 U.S. (21 Wall.) 503, 518 (1875).

b. In 1839, when Congress enacted the earliest predecessor version of Section 2462, it did so against a settled background understanding that the federal courts would apply the discovery rule in cases of fraud.[7] Indeed, this Court had said nearly a decade earlier in *Willison* that it was the "well settled and unquestioned rule[]" in federal courts that a limitations period "does not run until the discovery of the fraud." 28 U.S. (3 Pet.) at 52-53. In light of the "presumption that Congress understands the state of existing law when it legislates," *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988), Congress should be assumed to have incorporated into Section 2462 the settled principle that statutes of limitations in cases of fraud run from the date of (actual or constructive) discovery. See, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 212-213 (1993). Congress subsequently amended the statute in 1874 and then recodified it in 1948 without making any relevant substantive change. See Rev. Stat. § 1047, 18 Stat. 193 (1874); Act of

---

[7] Petitioners contend that "[t]he current version of Section 2462 traces back to a 1790 statute." Br. 49; see Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119. That is incorrect. The 1790 provision on which petitioners rely forbade certain punishments for most capital and non-capital cases "unless the indictment or information * * * shall be found or instituted within two years from the time of committing the offence." *Ibid.* The true historical antecedent to Section 2462 was enacted in 1839 and focused solely on suits for penalties or forfeiture. See Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322. Like current Section 2462, the 1839 provision had a five-year time limit, which ran "from the time when the penalty or forfeiture *accrued*." *Ibid.* (emphasis added); see Cato Inst. Amicus Br. 6 ("The operative language of [Section] 2462 first appeared in an 1839 version of the statute."). But even if Section 2462 were traceable to the 1790 provision, it was clear even at that time that the limitations period in a suit for fraud does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the facts constituting the fraud.

June 25, 1948, Pub. L. No. 80-773, 62 Stat. 974 (28 U.S.C. 2462).

c. Petitioners contend that in 1839, when the earliest predecessor version of Section 2462 was enacted, "a claim was understood to accrue when it could be sued on." Br. 50. But again the authorities they cite (Br. 51) for that proposition involve *nonfraud* claims and thus implicate only the general rule that a claim accrues when a plaintiff has the right to bring suit. See, *e.g.*, *Smith* v. *United States*, 143 F.2d 228, 228-230 (9th Cir.) (defendant was convicted of a tariff violation and failed to pay the entire court-ordered fine; government brought suit under Section 2462 for the unpaid balance), cert. denied, 323 U.S. 729 (1944). Petitioners identify a single fraud case, *United States* v. *Maillard*, 26 F. Cas. 1140 (S.D.N.Y. 1871) (No. 15,709), in which a district court held that a fraud claim accrues for purposes of Section 2462 at the time of the fraud, regardless of when the government could have discovered it. See *id.* at 1142-1143. The district court in *Maillard* appeared to believe that it was bound by state law rather than federal law in interpreting Section 2462. See *id.* at 1143 (citing New York cases). In any event, the district court did not discuss this Court's prior decisions in *Willison* or *Moore* recognizing the fraud discovery rule, and it expressly rejected Justice Story's influential circuit court opinion in *Sherwood*. See *ibid.* Petitioners thus rely on an outlier district court decision that, even at the time, was directly contrary to this Court's precedent.[8]

---

[8] Petitioners identify (Br. 32 n.23) a handful of early decisions in which state courts declined to apply a discovery rule in actions at law. Although there was some disagreement in state courts as to whether the discovery rule could apply at law as in equity, see *Sherwood*, 21 F. Cas. at 1306-1307, this Court declared in *Willison* that in federal

2. The historical exception covers cases of fraud as well as cases of concealment

a. Petitioners argue that the fraud discovery rule applies only when "the defendant affirmatively conceal[s] the existence of her wrongful conduct from the plaintiff." Br. 26; see Br. 25-28 & n.22. Petitioners contend on that basis that the discovery rule does not extend the limitations period in this case because they did not take affirmative steps to conceal their fraud. That contention, the court of appeals recognized, conflates two distinct (though related) justifications for extending an applicable limitations period. See Pet. App. 18a-19a. One justification is that the fraudulent nature of a defendant's offense prevents a plaintiff from knowing that she has been defrauded. Another is that the defendant has misrepresented or concealed facts that are essential to a plaintiff's cause of action, whether or not that cause of action is for fraud. See, *e.g.*, *Riddell* v. *Riddell Wash. Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989) (distinguishing between "wrongs as to which concealment is established by the nature of the act, and wrongs as to which additional acts of concealment are required") (internal quotation marks omitted). In either situation, an applicable limitations period does not begin to run until the plaintiff is aware, or reasonably could have been aware, of the facts underlying her cause of action. See *TRW*, 534 U.S. at 27 (noting that the discov-

---

courts a "statute of limitations receives the same construction and application at law and in equity." 28 U.S. (3 Pet.) at 52; see *Bailey*, 88 U.S. (21 Wall.) at 349 ("[T]he weight of judicial authority, both in this country and in England, is in favor of the application of the [fraud discovery] rule to suits at law as well as in equity."). It is that view, not the minority view of a few state courts, on which Congress continually relied in enacting, amending, and codifying Section 2462.

ery rule has historically applied "in cases of fraud *or* concealment") (emphasis added).

This Court has long recognized that either of those circumstances justifies deferring the commencement of a limitations period for so long as the plaintiff is reasonably unaware of the facts underlying his claim. In *Bailey*, the Court observed that "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud." 88 U.S. (21 Wall.) at 347-348. The Court further explained, however, that "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, *though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.*" *Id.* at 348 (emphasis added). The Court in *Bailey* thus made clear that the discovery rule applies in both circumstances.

Petitioners correctly observe (Br. 27) that the plaintiff in *Bailey* alleged "that the defendants kept secret and concealed * * * the fraud." 88 U.S. (21 Wall.) at 348. The Court declined, however, to rest its decision on that fact. Rather, the Court concluded that "when the fraud has been concealed, *or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing." *Id.* at 349-350 (emphasis added). That conclusion was consistent with this Court's previous recognition that a plaintiff could invoke the discovery rule by pleading "particular acts of fraud or concealment" that had delayed the commencement of the limitations pe-

riod. *Beaubien* v. *Beaubien*, 64 U.S. (23 How.) 190, 208 (1860); see *Stearns* v. *Page*, 48 U.S. (7 How.) 819, 829 (1849).[9]

b. This Court's conclusion in *Bailey* was not novel. Long before *Bailey*, lower courts had held that plaintiffs whose causes of action were based on fraud did not have to plead additional acts of concealment in order to invoke the discovery rule. See, *e.g.*, *Carr* v. *Hilton*, 5 F. Cas. 134, 136 (C.C.D. Me. 1852) (No. 2436) (Curtis, J.) ("It is objected, however, that this bill does not contain any averment that the cause of action was fraudulently concealed. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment."); *Way* v. *Cutting*, 20 N.H. 187, 193 (1849) ("[T]he position assumed by the defendant, that some new act of fraud and concealment, beside the representation made at the sale, must be proved upon him in order to deprive him of the protection of the statute, is not supported by authority or sound reason."); *Homer* v. *Fish*, 1 Mass. (1 Pick.) 435, 438 (1823) ("[W]e do not find that a particular averment of * * * any act of the party by which the knowledge of [the fraud] was prevented, is necessary."); see also John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 880 (1933) ("Where undiscovered 'fraud' was the basis of liability, it was universally agreed that no new concealment was necessary and the wrongdoer might remain wholly passive, provided no avenues were

---

[9] In *Credit Suisse Securities (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012), this Court discussed concealment as a possible ground for suspending the limitations provision because that was the ground potentially applicable to that nonfraud case. *Id.* at 1419-1420. The Court had no occasion to address the application of the discovery rule to cases where the underlying violation sounds in fraud.

open to the plaintiff for discovery of the fraud.") (Dawson); *id.* at 880 n.12 (collecting cases).

The theory behind those cases was simple: "[A]s fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate." *Hovenden* v. *Lord Annesley*, 2 Schoales & Lefroy 634 (Ir. Ch. 1806). Or as the court of appeals explained in this case, "fraud claims by their very nature involve self-concealing conduct," and thus "it has been long established that the discovery rule applies where, as here, a claim sounds in fraud." Pet. App. 18a. The other courts of appeals to consider the question have reached the same conclusion. See *Koenig*, 557 F.3d at 739 ("[T]he nineteenth century recognized a special rule for fraud, a concealed wrong."); *Tambone*, 550 F.3d at 148 (noting "the self-concealing nature of the defendants' [fraudulent] conduct"); cf. *Texas* v. *Allan Constr. Co.*, 851 F.2d 1526, 1529 (5th Cir. 1988) ("[I]n a fraud case, the plaintiff need only aver the underlying fraud in order to toll the statute of limitations until such time as the plaintiff had some notice of the wrong; fraud is, by its very nature, self-concealing.").

That approach follows naturally from equity's primary justification for the fraud discovery rule, which is to prevent defendants from unfairly relying on statutes of limitations when their own acts have kept potential plaintiffs in the dark. See p. 13, *supra*; *Glus*, 359 U.S. at 232-233. The Court's treatment of "concealment" as a distinct ground for delaying the commencement of the limitations period reflects a recognition that this equitable principle may be implicated *even though* the underlying claim does not sound in fraud. That recognition provides no sound basis for declining to apply the discovery rule to actual fraud claims. As the Court ex-

plained in *Bailey*, "[t]o hold that * * * by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made sucessful and secure." 88 U.S. (21 Wall.) at 349; see Dawson 882 (requiring affirmative concealment in cases of fraud is "unnecessary" because there are "elements of immorality on the defendant's part * * * in the original injury"). Simply put, petitioners point to nothing in law or logic for the notion that equity intervenes not at the original wrong (a defendant's fraud) but only at the subsequent one (a defendant's concealment of that fraud).

B. In Fraud Cases, The Discovery Rule Is Read Into Federal Statutes Of Limitations Unless Congress Specifies Otherwise

1. Petitioners argue (Br. 11-18) that applying a fraud discovery rule is inconsistent with the text of Section 2462, which imposes a five-year time limit without establishing any express exception for cases involving fraud or concealment. Whether described as a doctrine of accrual or tolling, however, the discovery rule has long been understood as a background principle that presumptively governs the application of federal limitations statutes unless Congress specifies otherwise. Indeed, nearly a century ago, this Court squarely held that the discovery rule may delay the running of a limitations period in cases of fraud, even in the absence of an express statutory "provision that the cause of action should not be deemed to have accrued until the discovery of the fraud." *Exploration Co.*, 247 U.S. at 447. As the Court recognized there, the doctrine's applicability

does not depend on express language incorporating it into a federal limitations statute.

The court of appeals therefore correctly reasoned "that for claims that sound in fraud a discovery rule is read into the relevant statute of limitation." Pet. App. 20a. This Court and other courts have long said the same thing. See, *e.g.*, *Holmberg*, 327 U.S. at 397 ("This equitable doctrine is read into every federal statute of limitation."); *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) ("[T]he 'discovery rule' of federal common law * * * is read into statutes of limitations in federal-question cases * * * in the absence of a contrary directive from Congress."), cert. denied, 501 U.S. 1261 (1991); *Dabney* v. *Levy*, 191 F.2d 201, 205 (2d Cir.) (Hand, J.) ("[I]n cases of fraud, * * * when Congress does not choose expressly to say the contrary, the period of limitation set by it only begins to run after the injured party has discovered, or has failed in reasonable diligence to discover[,] the wrong.") (internal quotation marks omitted), cert. denied, 342 U.S. 887 (1951).

For that reason, this Court has repeatedly applied the fraud discovery rule to limitations statutes that did not contain express language regarding the plaintiff's discovery of his cause of action. See *Holmberg*, 327 U.S. at 397; *Exploration Co.*, 247 U.S. at 449; *Rosenthal*, 111 U.S. at 189; *Bailey*, 88 U.S. (21 Wall.) at 347; *Kirby*, 120 U.S. at 136. Petitioners do not attempt to reconcile the results in those cases with their textual argument. They characterize (Br. 26, 28 n.22) those decisions as recognizing an exception only for concealment and not fraud (which is itself an inaccurate characterization, see pp. 30-31, *supra*), but none of the limitations statutes at issue in those cases contained any express language regarding fraud *or* concealment. Petitioners' textual argu-

ment simply cannot be squared with this Court's understanding and application of the fraud discovery rule. Abandonment of the long-settled background understanding reflected in this Court's decisions would be especially ill-conceived because Congress has relied on that understanding in drafting innumerable federal limitations statutes. See, *e.g.*, *Gomez-Perez* v. *Potter*, 553 U.S. 474, 488 (2008); *Kelly* v. *Robinson*, 479 U.S. 36, 46 (1986).

Moreover, petitioners' argument does not depend solely on "the plain language of Section 2462." Br. 11 (capitalization and emphasis omitted). Petitioners contend (Br. 12, 16) that Section 2462's five-year period began to run when all of the events necessary to the SEC's cause of action had occurred. Petitioners do not and could not contend, however, that the text of Section 2462 specifically identifies that as the applicable test. Rather, in arguing that the claims here "accrued" upon the commission of their violation, petitioners rely on settled *general* background understandings of the term "accrued," while ignoring the equally settled rule that a *fraud* claim "accrues" on the date of actual or constructive discovery. There is no warrant in either history or the plain text of Section 2462 for petitioners' pick-and-choose approach.

Section 2462's five-year time limit likewise contains no express exceptions for other equitable doctrines like forfeiture, waiver, and tolling. This Court has repeatedly held, however, that federal statutes of limitations are generally "subject to rules of forfeiture and waiver," and that courts are typically permitted "to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008); see *Holland* v. *Florida*,

130 S. Ct. 2549, 2560 (2010) (explaining that federal statutes of limitations are "normally subject to a 'rebuttable presumption' in favor 'of equitable tolling'") (quoting *Irwin*, 498 U.S. at 95-96; emphasis omitted). As with the doctrines of forfeiture and waiver, the crucial question here is not whether Section 2462 explicitly incorporates the fraud discovery rule, but whether Congress has clearly displaced the usual rule that limitations periods in fraud cases are triggered by actual or constructive discovery.

2. Petitioners also argue (Br. 16-18) that Congress clearly displaced the fraud discovery rule in the text of Section 2462. Petitioners note (Br. 17) that Section 2462 imposes a five-year time limit on civil penalty actions "[e]xcept as otherwise provided by Act of Congress." That phrase merely recognizes that Section 2462 is a catch-all provision governing numerous actions brought by different federal agencies, and that particular statutes authorizing suits for civil penalties may have their own limitations provisions. See *3M Co.*, 17 F.3d at 1461; see also *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988). Congress has not "otherwise provided" here, however, because the Advisers Act authorizes the SEC to seek civil penalties but does not specify the time within which the Commission must sue. Because (as explained above) the date of actual or constructive discovery is ordinarily the "accrual" date of a fraud claim, the introductory language of Section 2462 provides no basis for departing from that approach here.

Similarly, petitioners contend that "the language of Section 2462 is peremptory" because "[i]t directs that courts 'shall' not entertain" suits for civil penalties after five years. Br. 17. But that is a common feature of federal limitations statutes. This Court has often invoked

the fraud discovery rule in cases where the limitations statutes at issue contained the verb "shall." See *Exploration Co.*, 247 U.S. at 445; *Rosenthal*, 111 U.S. at 189; *Bailey*, 88 U.S. (21 Wall.) at 344. Section 2462's directive that a court "shall" dismiss an untimely action sheds no light on whether any particular suit is untimely. In particular, it does not suggest that Congress departed here from the usual rule that a fraud claim "accrues" on the date of actual or constructive discovery.

Petitioners emphasize (Br. 17) that the time limit in Section 2462 runs "from the date when the claim *first* accrued" (emphasis added). The term "first," however, adds nothing to the parties' dispute about when the Commission's claims "accrued." Each of the Commission's claims could accrue only at a particular point in time. For petitioners, that point in time is when they committed the fraud underlying the claim; for the government, it is the Commission's actual or constructive discovery of the same fraud. There is consequently no difference for these purposes between when the Commission's claims "accrued" and "first accrued." See *Franconia Assocs.* v. *United States*, 536 U.S. 129, 145 (2002) (explaining that the words "first accrues" are "unexceptional" and do not create "a special accrual rule"). In determining when a claim first accrues, courts should take into account the background principles governing accrual in a particular context, see *ibid.*, and one of those principles is the fraud discovery rule.

Finally, petitioners argue (Br. 16-17) that, by creating an exception to Section 2462's five-year time limit when "the offender or the property is [not] found within the United States," Congress precluded any further exception for cases of fraud or concealment. That argument is inconsistent with the history and nature of the

fraud discovery rule, which English courts applied under a limitations statute—the Statute of James—that contained express exceptions. See *Sherwood*, 21 F. Cas. at 1303 (applying the discovery rule even though "[t]he statute of limitations * * * contains like exceptions [to the Statute of James] in favour of infants, femes covert, &c."); see also *Jackson* v. *Speer*, 974 F.2d 676, 678-680 (5th Cir. 1992); *Cada*, 920 F.2d at 451. This Court has applied the fraud discovery rule in the same way. See *Kirby*, 120 U.S. at 135-139.

C. When Congress Has Explicitly Addressed Discovery In Other Federal Limitations Statutes, It Has Generally Done So In Order To Expand Or Contract The Traditional Rule

1. Petitioners contend (Br. 18-25) that when Congress intends the discovery rule to apply in a particular context, Congress says so expressly in the relevant federal limitations statute. That contention is incorrect for the same reasons as petitioners' plain-text argument. In cases of fraud or concealment, the discovery rule "is read into every federal statute of limitation." *Holmberg*, 327 U.S. at 397. Accordingly, as the court of appeals explained, Congress typically has addressed discovery in other federal statutes not to codify the traditional fraud discovery rule, but to alter the rule's usual operation in either of two ways: (a) by *expanding* the discovery rule to include nonfraud cases or (b) by *contracting* the amount of time a plaintiff would otherwise have to bring suit. See Pet. App. 20a.

a. In some federal statutes, Congress has specified that a limitations period commences upon discovery of a cause of action that is not based on fraud. By specifying that the limitations period runs from a claim's dis-

covery, Congress has ensured that the period does not run instead from the date of the events giving rise to the plaintiff's cause of action. See, *e.g.*, 15 U.S.C. 78u-6(h)(B)(1)(iii)(I)(bb) (Supp. V 2011) (three-year time limit for antiretaliation actions by securities whistleblowers from "the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation"); 26 U.S.C. 7431(d) (two-year time limit for certain taxpayer actions from "the date of discovery by the plaintiff of the unauthorized inspection or disclosure").

Similarly, Congress sometimes specifies that a limitations period commences upon discovery when the provision governs both fraudulent and nonfraudulent conduct. For instance, Section 2415 of Title 28 establishes general time limits on contract and tort claims brought by the United States for money damages. See 28 U.S.C. 2415(a) (six-year time limit for contract claims); 28 U.S.C. 2415(b) (three-year time limit for tort claims). Those time limits run from the accrual of the government's right of action. Section 2416(c) provides, however, that those time limits do not run during any period when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." Section 2416(c) thus ensures that the discovery rule operates with respect to *all* of the government's contract and tort claims, regardless of whether those claims are based on fraud, and regardless of whether the government's unawareness of the relevant facts is attributable to affirmative acts of concealment by the defendant.

b. In other statutes, Congress has addressed discovery not to expand the traditional rule, but to contract or

displace it. In particular, Congress sometimes establishes time limits with a two-part structure that combines an express discovery rule with an absolute period of repose. See, *e.g.*, 21 U.S.C. 335b(b)(3)(B) (requiring that suit must be commenced within six years from discovery of material facts, but in no event more than ten years after the violation); 28 U.S.C. 1658(b) (same; two years from discovery of the facts constituting the violation, but in no event more than five years after the violation). In that type of dual-prong provision, the express discovery rule functions very differently from its traditional counterpart. First, those express discovery rules can only *shorten* the time for bringing suit: a plaintiff who becomes aware of her claim must bring suit within the defined period after discovery, even if the repose period has not yet elapsed. Second, the repose limit displaces the traditional fraud discovery rule in cases where, as a result of fraud or concealment, plaintiffs discover violations after the repose period has elapsed. For both of those reasons, petitioners are wrong in arguing (Br. 21 & n.18, 23) that such dual-prong provisions codify the traditional fraud discovery rule.[10]

2. Petitioners are correct (Br. 20-21) that, on rare occasions, Congress has expressly codified the traditional fraud discovery rule. See 19 U.S.C. 1621 (requir-

[10] It makes no difference if, in a limitations provision that combines an express discovery rule with an absolute period of repose, the outer limit runs from the date on which the claim accrued rather than the date of the violation. See 15 U.S.C. 77www(a) (2000) (requiring suit "within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued"); 15 U.S.C. 78r (2000). The text and structure of such a provision make clear that, even in cases of fraud or concealment, a claim's accrual is governed by general accrual principles, not by the traditional fraud discovery rule.

ing that suit be commenced "within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud"); 19 U.S.C. 1641(d)(4) (similar); cf. 15 U.S.C. 1679i (extending the limitations period in misrepresentation cases against credit repair organizations until "the date of the discovery by the consumer"). By doing so, Congress "may have simply intended to remove any doubt" that the fraud discovery rule applies in those contexts. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008); see *Fort Stewart Schs.* v. *FLRA*, 495 U.S. 641, 646 (1990) (noting that "technically unnecessary" exceptions may have been "inserted out of an abundance of caution"). In any event, petitioners cite no authority for the counterintuitive proposition that, when Congress codifies an established canon of construction in a particular federal law, the canon ceases to govern the interpretation of other federal statutes. Congress's occasional express endorsement of the fraud discovery rule does not render the rule inapplicable to statutes where it is neither explicitly incorporated nor explicitly displaced.

D. The Fraud Discovery Rule Applies Equally To The Government As To Private Plaintiffs

1. Petitioners contend (Br. 31, 33) that the fraud discovery rule applies only to suits brought by private plaintiffs, not to government actions for civil penalties. Nearly a century ago, however, this Court explained that there is "no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the Government as well as a private individual." *Explo-*

ration Co., 247 U.S. at 449; see *ibid.* ("We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the Government."); *Koenig*, 557 F.3d at 739 ("[T]he United States is entitled to the benefit of [the fraud discovery] rule even when it sues to enforce laws that protect the citizenry from fraud, but is not itself a victim.") (citing *Exploration Co.*). To the extent that Section 2462 is unclear, its interpretation is governed by the canon that "when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous." *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 96 (2006). Petitioners provide no reason to abandon that approach here. Equitable-tolling principles are presumptively applicable to private suits *against* the government, see *Irwin*, 498 U.S. at 95-96, and it would be perverse to deny the sovereign alone the benefit of the fraud discovery rule.

Petitioners argue that, in *Exploration Co.*, "the government was suing for restitution [and] standing in for a private stakeholder who was defrauded by a private party." Br. 28 n.22. That is incorrect. The defendants in *Exploration Co.* had obtained federal lands by fraud, and the United States brought suit to annul the land patents. See 247 U.S. at 445-446. The same type of action was at issue in *United States* v. *Minor*, 114 U.S. 233 (1885). In both cases, this Court held that equitable doctrines—the discovery rule in *Exploration Co.* and laches in *Minor*—apply in the same way to suits brought by the government as to suits brought by private plaintiffs. See *Minor*, 114 U.S. at 238 ("Of course, lapse of time[] as a defence to a suit for relief for these frauds

did not begin to run until the fraud was discovered."). Just as the government brought those cases to vindicate the public interest in lawful disposal of federal lands, the Commission brought this case to vindicate the public interest in lawful participation in the securities markets. See, *e.g.*, *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 189-190 (1963).[11]

2. Petitioners maintain (Br. 30-33) that the discovery rule applies only "where the party *injured* by the fraud remains in ignorance of it." *Bailey*, 88 U.S. (21 Wall.) at 348 (emphasis added). Petitioners contend that, because the Commission need not establish injury as an element of its fraud claims under the Advisers Act, the discovery rule does not apply to "a statutory [Advisers Act] claim—or any other statutory fraud claim." Br. 31. But equity's primary justification for the fraud discovery rule has centered on the *defendant's misconduct*, not on the particular disadvantage the plaintiff would suffer if its suit were dismissed as untimely. See *Glus*, 359 U.S. at 232 ("[W]e need look no further than the maxim that no man may take advantage of his own wrong."); *Holmberg*, 327 U.S. at 386 ("[F]raudulent con-

---

[11] Notably, the arguments that the defendants advanced in *Exploration Co.* are virtually indistinguishable from those pressed by petitioners here. See Appellants' Br., *Exploration Co.*, *supra* (No. 277). The defendants in that case argued that the plain text of the limitations provision did not contain an exception for fraud, *id.* at 36; that Congress could have included such an exception if it had desired, *id.* at 27-35, 60-62; that the defendants had not taken affirmative steps to conceal their fraud, *id.* at 42, 72-73; that the discovery rule could be invoked only by private litigants, not the government, *id.* at 63-66; and that adopting a contrary approach would raise administrability concerns and permit the government to delay investigating land patent fraud, *id.* at 67-72. The Court in *Exploration Co.* squarely rejected each of those arguments.

duct on the part of the defendant * * * may make it unfair to bar appeal to equity because of mere lapse of time."). Indeed, that equitable principle provides the core justification for distinguishing cases that involve fraud or concealment from other cases in which the plaintiff is reasonably unaware of the facts giving rise to his cause of action. See p. 19, *supra*. That principle is as applicable to government enforcement actions as to private suits.

To be sure, the Court in *Bailey* referred to the discovery rule as applying when the eventual plaintiff was "injured by the fraud [and] remains in ignorance of it." 88 U.S. (21 Wall.) at 348. But in *Bailey* and other cases where that language was repeated, the plaintiffs were private parties that had been injured by the defendants' fraud. See *id.* at 343; see also *Holmberg*, 327 U.S. at 393; *Kirby*, 120 U.S. at 131-132. Because private plaintiffs who sue for fraud typically must prove injury, see Restatement (Second) of Torts § 525 (1976), the language in *Bailey* accurately describes most of the cases in which the fraud discovery rule has been applied. But as the Court recognized in *Exploration Co.*, equity's rationale for the discovery rule is fully applicable to cases where Congress has authorized the government to bring fraud claims without a showing of injury. Indeed, the Court sometimes has stated that a limitations period does not begin to run "until the discovery of the facts constituting the fraud." *Amy*, 130 U.S. at 324-325; *Case of Broderick's Will*, 88 U.S. (21 Wall.) at 518-519. That formulation accurately captures the relevant inquiry and

encompasses the current SEC enforcement action for civil penalties.[12]

3. Petitioners contend (Br. 23) that it would be anomalous to allow the SEC, but not private plaintiffs, to bring suit more than five years after the defendant's fraudulent conduct occurred. See 28 U.S.C. 1658(b) (establishing a five-year period of repose in private securities-fraud suits). When Congress established that repose period on private suits in 2002, it did nothing to indicate that it intended to displace the traditional fraud discovery rule in enforcement actions brought by the government. And even under petitioners' reading of Section 2462, that provision is more generous to the government than Section 1658(b) is to private plaintiffs, because Section 2462 establishes a five-year period to sue even when the violation is discovered immediately, whereas suits under Section 1658(b) must be filed within "2 years after the discovery of the facts constituting the violation."

In any event, there is nothing unusual about permitting greater remedies to the government than to private parties. See, *e.g.*, *Minor*, 114 U.S. at 240; *United States* v. *Hoar*, 26 F. Cas. 329, 330 (1821) (No. 15, 373) (Story, J.). Congress wants to deter securities violations through the Commission's enforcement authority, and that purpose is separate from seeking to compensate

---

[12] This Court has extended the traditional discovery rule for cases of fraud or concealment to two other contexts: "latent disease and medical malpractice." *TRW*, 534 U.S. at 27; see, *e.g.*, *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000); *Urie* v. *Thompson*, 337 U.S. 163, 170-171 (1949). In those contexts, the application of the discovery rule may be linked to the nature of plaintiffs' injuries, but those cases are distinct from "the historical exception for suits based on fraud." *TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment).

injured victims. In addition, Section 2462 governs civil penalty actions in other contexts where the limitations provisions that apply to private suits may not clearly displace the discovery rule. In those contexts, it would be petitioners' approach creating the anomaly: private plaintiffs would be able to invoke the discovery rule in cases of fraud or concealment, but the government alone would not.

E. The Fraud Discovery Rule Balances The Need For Repose Against The Need To Prevent Abuse Of Limitations Statutes

1. Petitioners argue (Br. 37-43) that the fraud discovery rule is "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). But the fraud discovery rule does not reject those policies altogether; it simply balances them against competing values in cases where the defendant's own deceptive conduct has hindered his adversary's ability to seek redress. Its core justification is that defendants are not *entitled* to repose when their own deceptive conduct has effectively foreclosed potential plaintiffs from seeking redress. If defendants want to eliminate stale claims and uncertainty about their liabilities, they need only make public whatever they have previously concealed. Here, if petitioners had disclosed the market timing scheme to the fund's investors or to the Commission, the limitations period in Section 2462 would have commenced to run.

Petitioners argue (Br. 34-37) that this approach would allow perpetual penalties when the government alleges fraudulent violations of the securities laws. This

Court's response to that concern, however, has never been to require affirmative acts of concealment over and above the defendant's fraud. Rather, the Court has limited the potential consequences of the fraud discovery rule by emphasizing that actual *or constructive* discovery will trigger the limitations period. See, *e.g.*, *Credit Suisse Secs. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414, 1420 (2012); *Merck*, 130 S. Ct. at 1794-1795. Where a defendant's fraud or concealment would prevent a diligent plaintiff from learning the facts that give rise to his cause of action, the discovery rule appropriately ensures that the defendant does not benefit from his own wrongdoing. See, *e.g.*, *Prevost* v. *Gratz*, 19 U.S. (6 Wheat.) 481, 498 (1821) (observing that although the "length of time necessarily obscures all human evidence," it is likewise true that "the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a Court of equity to grant ample and decisive relief").

Petitioners rely (Br. 34-37) on a presumption against perpetual penalties, but that presumption is inapposite here. Congress has consistently described the SEC's monetary penalties imposed for regulatory violations as "civil" in nature, see, *e.g.*, 15 U.S.C. 77t(d) (2000), 78u(d)(3) (2000), 80b-9(e)(1), and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Hudson* v. *United States*, 522 U.S. 93, 100 (1997) (internal quotation marks omitted); see *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 210-211 (1845) (Story, J.) (recognizing that civil penalty provisions are not penal laws to which the rule of lenity applies). Moreover, Section 2462 actually prevents the imposition of

perpetual penalties by placing a five-year time limit on civil penalty actions. Cf. *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.) (holding that a criminal forfeiture action should be subject to a limitations period). Although that limitations period is suspended in cases of fraud or concealment, the delay results from the *defendant's* conduct, not the government's.

2. As noted above, the traditional discovery rule accounts for the importance of repose by providing that the limitations period in a fraud case begins to run when a reasonably diligent plaintiff *could have* discovered the relevant facts, even if the actual plaintiff did not discover them until later. Petitioners suggest in passing (Br. 29) that the Commission did not exercise reasonable diligence here. As the court of appeals recognized, however, that argument is, "at best, premature." Pet. App. 21a. This case arises on petitioners' motion to dismiss, and the complaint alleges that the SEC "did not discover [petitioners'] illegal conduct until late 2003" and "could not have discovered that wrongdoing earlier." J.A. 89. The court of appeals therefore correctly held that "at this stage in the litigation [petitioners] have not met their burden of demonstrating that a reasonably diligent plaintiff would have discovered this fraud prior to September 2003." Pet. App. 21a-22a.

F. The Fraud Discovery Rule Has Proved To Be Judicially Administrable For More Than Two Centuries

Petitioners advance various policy arguments why the traditional discovery rule should not apply to the Commission's civil penalty actions. None is persuasive.

1. Petitioners argue (Br. 43-49) that the decision below will be difficult to administer in two respects.

First, petitioners assert (Br. 47-49) that it will be hard for courts to determine whether a cause of action is based on fraud. That is not a difficult inquiry here. The relevant provisions of the Advisers Act make it unlawful for an adviser "to employ *any device, scheme, or artifice to defraud* any client or prospective client," 15 U.S.C. 80b-6(1) (emphasis added), or "to engage in any transaction, practice, or course of business which operates *as a fraud or deceit* upon any client or prospective client," 15 U.S.C. 80b-6(2) (emphasis added). Nor do petitioners identify any prior case in which the inquiry has been difficult. In cases of fraud or concealment, courts in England and America have applied the discovery rule for centuries. And, as explained earlier, this Court has long distinguished between cases involving fraud or concealment and cases in which the plaintiff is unaware for some *other* reason of the facts underlying his cause of action. Petitioners offer no reason to suppose that this distinction has proved unworkable in practice.

Petitioners also assert (Br. 44) that it will be hard for courts to determine when a large agency like the Commission constructively discovered a defendant's fraud. Again, petitioners identify no cases in which that inquiry has proved to be difficult. See *Koenig*, 557 F.3d at 739-740; *Tambone*, 550 F.3d at 148-149; see also *Exploration Co.*, 247 U.S. at 438 ("There was nothing in the [government] records * * * which could possibly have aroused a suspicion * * * until the reports of the special agents of the General Land Office were made in the latter part of 1909."); cf. *Merck*, 130 S. Ct. at 1798 ("[C]ourts applying the traditional discovery rule have long had to ask what a reasonably diligent plaintiff would have known and done in myriad circumstances."). Indeed, petitioners concede (Br. 43-44) that other fed-

eral statutes require courts to undertake virtually identical inquiries into the knowledge of government officials.

2. Petitioners assert that the Commission "has extensive powers and the five-year statute of limitations gives it sufficient time to fulfill the interest in law enforcement." Br. 40. That assertion places the cart before the horse. The Commission "can take evidence, subpoena documents, and compel testimony," *ibid.*, but its ability to exercise those powers does not put it on notice of the need to do so in a particular case when a defendant's fraud has concealed a violation of the securities laws. Indeed, petitioners' approach unrealistically envisions that the Commission (and other federal agencies that employ Section 2462) could constantly monitor every regulated entity and transaction for any hint of hidden fraud. That inefficient approach would only increase the burden on regulated entities generally, including those entities that have not engaged in any fraud or concealment.

In any event, the SEC's argument is not that "it has insufficient time to investigate" securities fraud, Br. 41, but that it should receive the five years granted to it by Congress in Section 2462. In authorizing the Commission to seek civil penalties, Congress recognized that increasingly "[i]nvestigations involve more complex issues of fact and law, the collection of evidence from foreign countries and the prosecution of defendants who, in many cases, have the financial means to fight and delay SEC actions for long periods of time, thus requiring a greater commitment of the SEC's resources." S. Rep. No. 337, 101st Cong., 2d Sess. 6 (1990). Fraud claims are typically *more* difficult to investigate and pursue than other types of claims, see *Lampf*, 501 U.S. at 377

(Kennedy, J., dissenting) ("The most extensive and corrupt schemes may not be discovered within the time allowed for bringing an express cause of action."), and there is no reason why Congress would have wanted the Commission and other agencies to have *less* time to do so.

3. Finally, petitioners suggest (Br. 39) that the court of appeals' approach would weaken the Commission's incentives to investigate fraud cases. Under the traditional fraud discovery rule, however, Section 2462's limitations period begins to run when a reasonably diligent plaintiff *could have* discovered the relevant facts, regardless of the date of actual discovery. Defendants can take limited discovery and can obtain summary judgment if there is no genuine issue of fact that the SEC failed to file in time. See, *e.g.*, *Corwin* v. *Marney, Orton Invs.*, 843 F.2d 194, 197-198 (5th Cir.), cert. denied, 488 U.S. 924 (1988). To bring an enforcement action like this one, moreover, the Commission must satisfy not only Section 2462's timing requirement, but also the pleading standards for fraud, which may become more difficult to meet as the defendant's conduct becomes more remote in time. See, *e.g.*, *SEC* v. *Cuban*, 620 F.3d 551, 552-553 & n.4 (5th Cir. 2010) (discussing those standards). If an enforcement suit is allowed to go forward and the Commission prevails on the merits, the district court has discretion to set the amount of any civil penalty, and it can consider the passage of time as well as other relevant factors. See, *e.g.*, 15 U.S.C. 80b-9(e)(2)(A) (providing that the "amount of the penalty shall be determined by the court in light of the facts and circumstances"). Taken together, the relevant statutory provisions create ample incentives for the Com-

mission to pursue its claims diligently, as it did in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MALCOLM L. STEWART
Deputy Solicitor General

JEFFREY B. WALL
Assistant to the Solicitor General

MARK D. CAHN
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

HOPE HALL AUGUSTINI
DOMINICK V. FREDA
Senior Litigation Counsels

DAVID LISITZA
Senior Counsel
Securities and Exchange Commission

DECEMBER 2012

REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
Alida Y. Lasker
Katherine L. Wilson-Milne
Jared M. Gerber
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500
kathleen.massey@dechert.com

Counsel for Petitioners

December 26, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE DISCOVERY RULE DOES NOT APPLY 1

A. Under Section 2462's Plain Language, The Limitations Period Runs From When The Government's Claim Arises 1

B. The Settled Meaning Of Accrue And Record Of Statutory Usage Undermine The Government's Argument 4

1. The Settled Meaning Undermines The Government's Argument 4

2. The Record Of Statutory Usage Undermines The Government's Argument 9

C. Implication Of A Discovery Rule In Section 2462 Is Inconsistent With The Purposes Of Statutes Of Limitations And The Separation Of Powers 11

II. THE GOVERNMENT'S ALTERNATIVE EQUITABLE TOLLING ARGUMENT SHOULD BE REJECTED 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases:

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 14, 18, 20

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 6, 20

Amy v. City of Watertown,
130 U.S. 320 (1889) 7, 8, 9

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 22

Bailey v. Glover,
88 U.S. 342 (1874) 7, 8, 18

Baldwin v. Reese,
541 U.S. 27 (2004) 18

Bankamerica Corp. v. United States,
462 U.S. 122 (1983) 2

Bowen v. Massachusetts,
487 U.S. 879 (1988) 4

Brogan v. United States,
522 U.S. 398 (1998) 18

Cent. Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 5, 9, 16

Credit Suisse Sec. (USA) LLC v. Simmonds,
132 S. Ct. 1414 (2012) 18

Exploration Co. v. United States,
247 U.S. 435 (1918) 8, 12

FEC v. Williams,
104 F.3d 237 (9th Cir. 1996) 20

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 6, 7, 19, 20

Keene Corp. v. United States,
508 U.S. 200 (1993) 5

Klehr v. A.O. Smith Corp.,
521 U.S. 179 (1997) 21

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 3, 11, 19, 20

Lindsey v. Normet,
405 U.S. 56 (1972) 14

Lorillard v. Pons,
434 U.S. 575 (1978) 4, 5

Merck & Co. v. Reynolds,
130 S. Ct. 1784 (2010) 13, 14

Merryman v. Bourne,
76 U.S. 592 (1869) 7

Reading Co. v. Koons,
271 U.S. 58 (1926) 2

Rotella v. Wood,
528 U.S. 549 (2000) 12, 13, 14, 17

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963) 3

SEC v. Cavanagh,
445 F.3d 105 (2d Cir. 2006) 17

SEC v. Commonwealth Chem. Sec., Inc.,
574 F.2d 90 (2d Cir. 1978) 17

SEC v. Koenig,
557 F.3d 736 (7th Cir. 2009) 19

SEC v. Tambone,
550 F.3d 106 (1st Cir. 2008) 19

Sherwood v. Sutton,
21 F. Cas. 1303 (C.C.N.H. 1828) 7, 8

Smith v. United States,
143 F.2d 228 (9th Cir. 1944) 5

Toussie v. United States,
397 U.S. 112 (1970) 20

TRW Inc. v. Andrews,
534 U.S. 19 (2001) ..... *passim*

Tull v. United States,
481 U.S. 412 (1987) 9, 20

United States v. Beggerly,
524 U.S. 38 (1998) 19

United States v. Blackwell,
459 F.3d 739 (6th Cir. 2006) 21

United States v. Brockamp,
519 U.S. 347 (1997) 19

United States v. Core Labs., Inc.,
759 F.2d 480 (5th Cir. 1985) 20

United States v. Kubrick,
444 U.S. 111 (1979) 16

United States v. Maillard,
26 F. Cas. 1140 (S.D.N.Y. 1871) 5

United States v. Providence Journal Co.,
485 U.S. 693 (1988) 2

United States v. Stewart,
433 F.3d 273 (2d Cir. 2006) 21

United States v. Witherspoon,
211 F.2d 858 (6th Cir. 1954) 20

W. Va. Univ. Hosps., Inc. v. Casey,
499 U.S. 83 (1991) 9

Willison v. Watkins,
28 U.S. (3 Pet.) 43 (1830) 7

Wood v. Carpenter,
101 U.S. 135 (1879) 14

Statutes:

5 U.S.C. § 552a(g)(5) 9

12 U.S.C. § 1782 10

12 U.S.C. § 2277a-6(b)(2) 9

15 U.S.C. § 77www(a) 10

15 U.S.C. § 78d-5(a) 16

15 U.S.C. § 78r 10

15 U.S.C. § 80b-4(a) 21

15 U.S.C. § 80b-7 21

18 U.S.C. § 1001 21

18 U.S.C. §§ 1501-21 21

18 U.S.C. § 1621 21

19 U.S.C. § 1621(1) 10

28 U.S.C. § 1658(b) 11

28 U.S.C. § 2462 . . . . . *passim*

Rules:

Fed. R. Civ. P 9(b) 17

Other Authorities:

Brief of the United States as *Amicus Curiae*, *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2009) 14

H.G. Wood, *A Treatise on the Limitations of Actions at Law and in Equity* § 274 (1893) 8

In the Matter of EM Capital Mgmt., LLC and Seth Richard Freeman, Order Instituting Administrative and Cease-and-Desist Proceedings, Investment Advisors Act of 1940 Release No. 3502 (Nov. 20, 2012) 21

S. Rep. No. 337, 101st Cong., 2d Sess. 25 (1990) ... 3

ARGUMENT

I. THE DISCOVERY RULE DOES NOT APPLY

The government starts from the wrong premise and thus reaches the wrong result. The government assumes—as did the Second Circuit—that a discovery rule applies to all federal statutes of limitations, including penal statutes that do not require evidence of injury, unless Congress otherwise provides, and then concludes that the discovery rule applies to Section 2462 because "Congress has [not] clearly displaced the usual rule." Opp. 10.[1] That argument cannot be squared with Section 2462's language, this Court's decisions, the relevant background law, or the statutory structure.

A. Under Section 2462's Plain Language, The Limitations Period Runs From When The Government's Claim Arises

The government concedes that, as a "general rule," "a claim accrues when a plaintiff has the right to bring suit." Opp. 28; *see also id.* at 21-22; Br. 12 (cases interpreting identical term). If "accrual" means arise, then, it means arise. Although the date a particular claim arises may vary depending on its elements, the meaning of the term "accrue" cannot vary. Br. 12-13. Interpreting a materially identical statute, this Court has held that "the fact that the limitation is made

---

[1] Unless otherwise designated, all abbreviations are as defined in Petitioners' Brief on the Merits, Nov. 9, 2012, referred to herein as "Br." "Opp." refers to Brief for the Respondent, Dec. 10, 2012.

applicable equally to . . . [t]wo causes of action, one of which admittedly 'accrues' on the happening of the events which fix the defendant's liability, leads persuasively to the conclusion that a like test was intended for determining when the cause of action accrued" for the other. *Reading Co. v. Koons*, 271 U.S. 58, 64 (1926); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983). It follows that a penalty claim for violation of a statute that addresses fraud, just like a penalty claim for violation of any other statute, accrues and the limitations period begins to run when the defendant's liability is fixed.

The remainder of the statutory language—when read as a whole, and not in isolation as the government would have this Court do, Opp. 36-38—confirms that common-sense interpretation. Congress "explicitly delineate[d] the exceptional case," *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001), where the limitations period does not continue to run (when "the offender or the property is [not] found within the United States," 28 U.S.C. § 2462) and therefore under both modern and contemporaneous rules of statutory construction, the courts are not "at liberty" to create additional exceptions. *TRW*, 534 U.S. at 23; Br. 16-17; SIFMA Br. 8-10. Moreover, Congress prescribed that the start-with-accrual rule was to be followed "[e]xcept as otherwise provided by *Act of Congress*," 28 U.S.C. § 2462 (emphasis added), not—as the government would have it—"[e]xcept as otherwise provided by law." *United States v. Providence Journal Co.*, 485 U.S. 693, 704-05 & n.9 (1988); *see also* Opp. 36. Congress therefore specified the governmental organ from which exceptions must come.

The answer to when the SEC's claim accrued here is also a matter of plain language. Congress provided that the limitations period for certain claims under the federal securities laws—not the one at issue here—would begin to run upon discovery. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). It also provided, without using language of discovery, that the SEC's claim for a penalty was ripe and the defendant's liability was fixed when an alleged IAA violation occurred, without regard to whether there was injury or damage. Br. 15-16; *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963).[2] The *latest* date alleged in the complaint is mid-2002, well more than five years before the SEC sued. Under the plain language, the SEC's claim is time-barred.

---

[2] The SEC quotes the Senate Report on the Remedies Act for the proposition that Congress intended to keep the limitations period open not just until discovery but for five years beyond. Opp. 50. The Report does not say a discovery rule should be applied to fraud penalty actions. To the extent it has any relevance, it says that the SEC should get access to grand jury information to ensure it can bring a claim within the statute of limitations. S. Rep. No. 337, 101st Cong., 2d Sess. 25 (1990).

B. The Settled Meaning Of Accrue And Record Of Statutory Usage Undermine The Government's Argument

1. The Settled Meaning Undermines The Government's Argument

The government ignores the statute's plain language. It argues, based largely on cases applying the fraudulent concealment doctrine, that Section 2462 should be interpreted categorically to "delay[] the running of a limitations period in cases of fraud," Opp. 18, because, despite the statute's plain language, there was a tradition at common law that "the limitations period in a suit for fraud does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying his claim," *id.* at 8, and Congress is presumed to "understand[] the state of existing law when it legislates." *Id.* at 27 (citation and quotation marks omitted). The government's argument is based on bad law and history. The history confirms the plain language.

The Court has stated that when Congress uses a "term of art" that "had at the time a well-known meaning at common law or in the law of this country, [that term is] presumed to have been used in that sense unless the context compels . . . the contrary." *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) (citation and quotation marks omitted); *see also Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988). It also occasionally presumes that when Congress reenacts a statute that has received a settled judicial interpretation, "Congress [is] aware of these earlier

judicial interpretations and, in effect, adopt[s] them." *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994).

Both those canons support the plain language. "Accrue" is a term of art, but its meaning "at common law [and] in the law of this country," *Lorillard*, 434 U.S. at 583 (citation and quotation marks omitted), is the moment a cause of action arises, *i.e.*, when the defendant's liability is fixed and complete. Br. 14, 50-53. The question of when any particular claim accrues is then a matter of the substantive law of that claim. Br. 15-16. Congress thus was not silent about when the limitations period began. *TRW*, 534 U.S. at 27.

Moreover, the only cases interpreting Section 2462 before its various reenactments uniformly concluded, as the language of the statute says, that a penalty, fine or forfeiture accrued under that statute "when the offence was committed," *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871), or at "the time of . . . the doing of the act by which the penalty or forfeiture was incurred," *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944).[3]

Indeed, to the extent there was any "background principle" that would have been in the forefront of Congress's mind, it is the principle that Chief Justice

---

[3] The government calls *Maillard* an "outlier decision" and rejects *Smith* as not involving fraud, Opp. 28, but it does not identify any other decision interpreting Section 2462 or its predecessors that say otherwise.

Marshall expressed in *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 338 (1805). The Court concluded that a statute of limitations addressed to the "punishment of certain crimes" and directed to the time by which an "indictment or information" had to be filed reached civil penalties not prosecuted by indictment or information and sought for violations that could not as a practical matter have been prosecuted within the limitations period. *Id.* (emphases omitted). As the Chief Justice put it: if the statute "does not limit actions . . . for penalties, those actions might, in many cases, be brought at any distance of time," a result that "would be utterly repugnant to the genius of our laws." *Id.* at 342.[4]

The government's history is not to the contrary. The government refers to what this Court has called "the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (citation and quotation marks omitted); Opp. 17.[5] At the time of Section 2462's passage, the

---

[4] *Adams* disposes of the government's argument regarding the antecedent to Section 2462. Opp. 27 & n.7. Although the statute spoke in terms of crimes chargeable by indictment or information, the fact it did so is irrelevant. The Court applied it to civil penalties on the basis that "it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Adams*, 6 U.S. (2 Cranch) at 342.

[5] *Holmberg* does not "establish a general presumption applicable across all contexts." *TRW*, 534 U.S. at 27. The law in *Holmberg*

"decided weight of authority" "in equity" applied that principle to do justice between wrongdoer and victim "*in mitigation* of the strict letter of general statutes of limitation." *Bailey v. Glover*, 88 U.S. 342, 347-48 (1874) (emphasis added); *see also Amy v. City of Watertown*, 130 U.S. 320, 324 (1889) (principle applied in "courts of equity . . . where one person has been injured by the fraud of another"); *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) (No. 12, 782) (applying doctrine where state courts were of concurrent jurisdiction and recognizing there was a "conflict of American decisions" in cases at law). In 1839, and indeed as late as 1889, that principle was not "consistently," Opp. 24, or uniformly adopted in the courts of law. *See also Amy*, 130 U.S. at 324; *Bailey*, 88 U.S. at 348. It did not "obtain[] the force of law in the English courts." *Amy*, 130 U.S. at 324. Nor did this Court suggest that it applied to a court of law until its 1875 decision in *Bailey*.[6] *See Holmberg*, 327 U.S. at 397. When state legislatures wanted the rule to apply

---

created an equitable remedy but did not have an explicit statute of limitations. 327 U.S. at 395. Thus, the Court applied settled equitable principles to fill in the gap—leading to its sweeping statement about what "is read into every federal statute of limitation." *Id.* at 397.

[6] *Willison v. Watkins*, 28 U.S. (3 Pet.) 43, 48-49 (1830), *see, e.g.*, Opp. 26-27, a real property case, held if a tenant disclaims a tenancy with knowledge of the landlord, the statute of limitations begins to run and the landlord may sue to recover possession. *See also Merryman v. Bourne*, 76 U.S. 592, 601 (1869). It was not cited by the Court or any parties in *Bailey*, and this Court has never cited it in any case involving the discovery rule or fraudulent concealment.

in the courts, they said so expressly by statute. *Amy*, 130 U.S. at 324-25; *Bailey*, 88 U.S. at 347.

The government does not identify a single case where the rule was applied where the claim required no proof of injury whatsoever. The government also fails to identify a single case in the 200 years Section 2462 has been on the books in which a court on either "side[] of the Atlantic," Opp. 25-26, applied a discovery rule to a governmental penalty claim in the absence of statutory language expressly prescribing discovery.[7] Even in the context of claims by injured victims, there was no settled understanding that a fraud claim accrued when discovered. *See Sherwood*, 21 F. Cas. at 1307; *see also* H.G. Wood, *A Treatise on the Limitations of Actions at Law and in Equity* § 274 (1893) ("The cause of action, except where the statute otherwise provides, in cases of fraud, arises from the time of its commission . . . ."); Br. 32-33 nn.23 & 24.

The "old chancery rule" thus was not, and could not have been, a "long-settled background understanding" that "Congress . . . relied on" in drafting Section 2462. Opp. 35. That law established a statute of limitations for a type of remedy—penalties—that "at common law

---

[7] *Exploration Co. v. United States* is based on the principle that "the rule . that statutes of limitations to set aside fraudulent transactions shall not begin to run until the discovery of the fraud appl[ies] in favor of the government as well as a private individual." 247 U.S. 435, 449 (1918); Opp. 41. It involved a government suit to recover from the wrongdoer lands "obtained by grant from the United States by means of fraud." *Exploration Co.*, 247 U.S. at 446. It does not support the extension of the rule to a remedy not available to a private party.

. . . could only be enforced in courts of law." *Tull v. United States*, 481 U.S. 412, 422 (1987). Unlike the remedies in the government's cases, those at issue here are "intended to punish culpable individuals, [not] simply to extract compensation or restore the status quo." *Id.* And, unlike in the government's cases, the limitations statute here applies to claims by persons who have not "been injured by the fraud of another," *Amy*, 130 U.S. at 324, and where injury is not an element of the violation. The history thus does not support the claim that in enacting a law that the limitations period for "any" penalty begins at the time of accrual, Congress nonetheless meant that it began with discovery.

2. The Record of Statutory Usage Undermines The Government's Argument

The "record of statutory usage" further supports the plain language and undermines the government's arguments. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88 (1991). Throughout history, when Congress intended a limitations period to run from discovery, it expressly said so. Br. 18-24.[8] From that history alone, the Court can "presume" that if Congress had intended the limitations period in Section 2462 to run from discovery, "it would have used the word[discovery] in the statutory text." *Cent. Bank*, 511 U.S. at 177; *id.* at 176, 181 (rejecting argument that "general principles of tort law" regarding aiding and abetting should attach to all federal civil statutes because Congress "knew

---

[8] *See also, e.g.*, 5 U.S.C. § 552a(g)(5); 12 U.S.C. § 2277a-6(b)(2).

how to impose aiding and abetting liability when it chose to do so").

The government concedes—as it must—that Congress uses "discovery" and "accrual" to mean two different things. When it meant discovery, it said "discovery." Opp. 40-41. Likewise, when it meant accrue, it said "accrue." The government admits that "accrue" and "discovery" must be given different meanings when both terms are used in the same statute. Opp. 40 n.10. Otherwise, the limitations statute for Section 18 of the Exchange Act, 15 U.S.C. § 78r, and Section 323 of the Trust Indenture Act, 15 U.S.C. § 77www(a) (both of which address claims of fraud), would be nonsensical in requiring actions to be brought "within one year after . . . discovery . . . and within three years after" discovery. If Congress meant accrue to be different than discovery in these other contexts, there is no reason to believe Congress meant accrue to be the same thing as discovery in Section 2462.

The government does not dispute that when statutes penalize lies to the government and Congress wanted the limitations period to run from discovery, and not the date the claim "first accrued," Congress felt the need to "otherwise provide[]." *See, e.g.*, Tariff Act, 19 U.S.C. § 1621(1); Federal Credit Union Act, 12 U.S.C. § 1782; Opp. 40-41. The inference is inescapable. Congress understood unless it otherwise provided, the limitations period would run from when the claim arose and not from when it was discovered. *See TRW*, 534 U.S. at 28.

Finally, the government agrees that when Congress expressly uses the term "discovery," it commonly combines that rule "with an absolute period of repose." Opp. 40. But if that is so, the government offers the Court no reason to believe that when Congress does not use the word "discovery" at all, it means discovery without repose.[9]

C. Implication Of A Discovery Rule In Section 2462 Is Inconsistent With The Purposes Of Statutes Of Limitations And The Separation Of Powers

The government argues that application of the discovery rule to a governmental penalty action is administrable and consistent with the purposes of the statutes of limitations because "[f]or centuries, courts have applied the traditional fraud discovery rule, and . . . have not found it difficult to determine . . . when a plaintiff . . . actually or constructively discovered th[e] fraud." Opp. 11. When it comes to how a defendant could ever discover the relevant facts in the SEC's possession or how a jury could ever determine what a

---

[9] The government's proposed rule cannot be squared with Congress's establishment of a firm "cutoff" of three years for private claims for damages under the securities laws. *Lampf*, 501 U.S. at 363. Even when Congress later extended the limitations period for private plaintiffs, it kept a "cutoff" of five years. *See* 28 U.S.C. § 1658(b). The government's proposed rule asks the Court to believe that Congress was sufficiently concerned with repose to bar a fraud remedy by injured victims who lack the tools for discovering fraud within the limitations period, but then cast aside that concern only for civil penalties brought by the government, where it is not defrauded and not injured.

reasonably diligent SEC would have known and done under the circumstances, the government tellingly offers only this: "[i]f defendants want to eliminate stale claims and uncertainty about their liabilities, they need only make public whatever they have previously concealed" or disclose it to the SEC. *Id.* at 46.[10] The government's argument is doubly mistaken.

Before the decision below, no court had ever held that a discovery rule applies to a government claim where the government is not the victim and no proof of injury is required. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock."). "[M]ost of the cases in which the fraud discovery rule has been applied" involved "plaintiffs [who] were private parties that had been injured by the defendants' fraud." Opp. 44. The only other circumstance cited by the government is the limited one where it was a victim that was injured by a defendant's fraud. Br. 28 n.22; *Exploration Co.*, 247 U.S. at 446.

Moreover, although application of a discovery of injury rule when injury is an element may be consistent with a statute of limitations, the rule makes no sense in a government enforcement action where the

---

[10] The government also asserts that it is easy to identify whether a claim involves "fraud." Opp. 49. But it does not dispute that the Second Circuit's test would potentially implicate a wide range of statutes, Br. 47, or identify a legal standard by which a court could determine which of these "sound[] in fraud," and thereby are governed by discovery, and which do not. Opp. 21.

government is not a defrauded victim and injury is not an element. Br. 38, 44. Where the plaintiff is a defrauded victim, the tort's objectives would be defeated if the law required the plaintiff both to "prove injury," Opp. 44, and bring her claim within a time period where, given the nature of the tort, she could not reasonably have known she was injured. *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1793 (2010); Br. 30-31. Also, "the traditional [fraud] discovery rule accounts for . . . repose by providing that the limitations period . . . begins to run when a reasonably diligent plaintiff *could have* discovered the relevant facts." Opp. 48. The government concedes, in those circumstances, delay is a function of the defendant's "misconduct in causing that delay." *Id.* at 10. If a reasonably diligent plaintiff would have known she was defrauded, the clock will begin to run; the timing will not be dictated by when the victim chooses to look. Br. 38-39; *Merck*, 130 S. Ct. at 1796. The defendant can take discovery of the facts that put the plaintiff "on notice . . . in a particular case." Opp. 11, 50. And courts and juries can determine whether the plaintiff has been "reasonably diligent" in discovering the necessary facts. *Merck*, 130 S. Ct. at 1798.

Where the government is not a defrauded victim, the accrual rule does not "effectively foreclose[]" the government from asserting a penalty claim or threaten its deterrent impact. Opp. 46. Many violations for which penalties are available may be "complex, concealed, or fraudulent," but that is not justification for applying a discovery rule. *Rotella*, 528 U.S. at 556; Br. 31. Where the government is seeking a penalty and injury is not an element, the delay is not a function of the nature of the defendant's "misconduct," but of when

the government chooses to "enquir[e]." *Rotella*, 528 U.S. at 556. If the government does not look, there may never be a time when it (not the putative victim) "discover[s] the facts underlying its claim, or could have discovered those facts by exercising reasonable diligence." Opp. 12.

Short of a public confession, Opp. 46, the government also offers no response for how, given the various privileges, a defendant could take discovery of the facts that "place the SEC on notice of the need to exercise [its investigative] powers." Opp. 11; *cf. Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Nor does the government offer any standard by which—assuming a defendant obtained discovery of confidential tips—a jury could determine "what a reasonably diligent [SEC] would have known and done" after it received a tip, or the time period within which it would have done it. *Merck*, 130 S. Ct. at 1798; Brief of the United States as *Amicus Curiae* at 17-18, 24, *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2009); *Rotella*, 528 U.S. at 559. Nor does it address how that question is conceivably appropriate for judicial review or the problems of faded memories and lost evidence. Br. 46; *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

The government's interpretation is inimical to the purposes of repose that are "vital to the welfare of society" and "giv[e] security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); Br. 39. The government let its claim lapse here because it inexcusably delayed bringing suit after petitioners, having already twice signed tolling agreements, desired repose and refused to sign a third

time. Br. 3-4. The rule for which it argues, however, would reach far beyond that situation. Vast areas of our lives are subject to federal regulation and involve the exercise of judgment and discretion where regulatory requirements could later "be subject to new and unpredictable interpretations." Cato Br. 20. Individuals and those with whom they transact rely on the notion that the legal system at some point grants repose and protects their decisions from second-guessing. *See* SIFMA Br. 27-29; NACDL Br. 17-20. The government's argument would leave individuals and businesses in a state of perpetual uncertainty, leaving open all that conduct "for that portion of eternity concurrent with the [defendant's] life, whether he lives three score and ten or as long as Methuselah." Pet. 16 (citation and quotation marks omitted).

The government's interpretation is also inconsistent with the objective of every statute of limitations to protect all persons—innocent, guilty, or wrongfully accused—from the risk that they will be charged long after "evidence has been lost, memories have faded, and witnesses have disappeared." Br. 42-43 (citation and quotation marks omitted); NACDL Br. 6-9; SIFMA Br. 20. Not everyone the government accuses of engaging in "deceptive conduct" has engaged in misconduct. Opp. 46. Nor, in the absence of government regulation, is one who violates the law necessarily required to report that violation to the government. And, even for the guilty, if the only way to enjoy repose would be to publicly confess, a statute of limitations would have little purpose.

The government's rule is likewise inconsistent with Congress's objective to focus the government's penal power where it has the most force. Br. 42. The government contends it pursues prosecutions with zeal. Opp. 11-12. But the standard for which it argues would permit it to function with lassitude. Section 2462's purpose is to limit the government's penal authority to those violations that are most fresh and where the deterrent value of a penalty is greatest;[11] it is not to "plac[e] a . . . limit" on the time between the government's (presumably secret) conclusion that a defendant committed fraud and the government suit for that fraud. Opp. 48.[12] Enforcement of the statute of limitations will naturally result in some—whose conduct is dated—avoiding prosecution for a penalty. The enforcement resources that will be freed up can be focused on fresh cases. That is the natural and ordinary effect of a statute of limitations. *United States v. Kubrick*, 444 U.S. 111, 125 (1979). Though extending a cause of action "no doubt makes the civil remedy more far reaching," "it does not follow that the objectives of the statute are better served." *Cent. Bank*, 511 U.S. at 188. Section 2462's plain language does not permit a defendant to benefit "from his own wrongdoing," Opp. 47, or prevent the SEC from deterring misconduct. *Id.* at 45-46. If there are ill-

---

[11] *See* SEC Comm'rs Br. 4-9 (explaining lost deterrence value in pursuing stale claims); NACDL Br. 11-13 (same).

[12] The Dodd-Frank Act performs that function by requiring the SEC to "either file an action . . . or provide notice . . . of its intent to not file an action" "[n]ot later than 180 days after the date on which Commission staff provide a written Wells notification to any person" suspected of a violation. 15 U.S.C. § 78d-5(a).

gotten gains or a defendant is likely to violate the securities laws, the SEC can seek equitable remedies such as disgorgement or an injunction. *See SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99-100 (2d Cir. 1978). If, however, the SEC wants to punish, it must obey Congress's words or ask Congress to change them.[13]

II. THE GOVERNMENT'S ALTERNATIVE EQUITABLE TOLLING ARGUMENT SHOULD BE REJECTED

Unable to defend the decision below on the basis of the statute's language, history, or purpose, the government asks this Court to disregard the language and suggests equitable tolling for fraudulent concealment applies. Opp. 8, 21. It argues that, regardless of statutory language, courts have applied a discovery rule "for more than two centuries" and since "the earliest days of the Republic." *Id.* at 48, 9. The difference between the discovery rule and fraudulent concealment is not "unimportant in practice." *Id.* at 21 (citation and quotation marks omitted); *see also Rotella*, 528 U.S. at 561; DRI Br. 10-14. The decisions the government cites are not based on a categorical

---

[13] The government also suggests that Fed. R. Civ. P. 9(b) requires it to plead fraud with particularity, Opp. 51, but that rule would be applicable even if a claim were untimely and thus cannot stand in for the statute of limitations. *See Rotella*, 528 U.S. at 560. Congress also did not specify the date of a violation as a factor the courts should consider in setting a penalty and therefore the government cannot use the penalty factors to support its argument that Congress intended the discovery rule to apply.

discovery rule for fraud. Opp. 16. They are founded on the notion that, in a particular case, a defendant who engaged in fraud that "has been concealed, or is of such character as to conceal itself" from the victim, *Bailey*, 88 U.S. at 349-50, could not "as a matter of equity" "unfairly rely[] on a statute of limitations" to complain that the victim's claim was untimely. Opp. 13; *see also* Br. 26-27.

The government waived this argument both orally and in writing, and the Second Circuit explicitly did not rely on it. Br. 27. Therefore, it is not properly before the Court. *See, e.g.*, *Baldwin v. Reese*, 541 U.S. 27, 34 (2004).

In any event, the claim is meritless, largely for the reasons the discovery accrual claim is meritless. The government did not allege and does not identify any "extraordinary circumstances [that] stood in [its] way," *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20 (2012) (citation and quotation marks omitted), or any conduct by either petitioner that "effectively foreclosed" the SEC "from seeking redress." Opp. 46. Every piece of evidence it relied upon in framing its complaint indisputably was a document from the files of the investment adviser that must be preserved "in an easily accessible place," subject to examination by the SEC at any time. Br. 40 (citation and quotation marks omitted). The SEC knew about market-timing generally; if it wanted to know more, it could have asked. Br. 40-42; *cf. Brogan v. United States*, 522 U.S. 398, 408-18 (1998) (Ginsberg, J., concurring); *3M*, 17 F.3d at 1461 n.15. The court of appeals held, and the government argues, that "the discovery rule defines when the claim accrues," because

as a *categorical* matter it was able to state a claim for aiding and abetting a violation of the IAA and "'the Advisers Act claim is made under the antifraud provisions of that Act.'" Opp. 20 (quoting Pet. App. 19a).

Moreover, were the Court to reach the issue, it should hold that fraudulent concealment and equitable tolling are not available under Section 2462. The Court has stated, "[i]f Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg*, 327 U.S. at 395. The Court has applied equitable tolling only when consistent with the text and structure of the statute, *see TRW*, 534 U.S. at 28; *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *United States v. Brockamp*, 519 U.S. 347, 349-54 (1997); *Lampf*, 501 U.S. at 363, and never to a "penal" statute or when the government seeks to use its police powers to punish.[14]

Here, not only is Congress's language emphatic, but the government cannot explain how tolling can be reconciled with the statute's structure or purpose. The Court has held that fraudulent concealment does not apply to securities fraud claims brought by injured plaintiffs who might not be able to discover them within the time allowed for bringing a damages action.

---

[14] The government cites only two appellate cases from the last two centuries for equitable tolling applying to Section 2462—both from the last five years and both simply assuming equitable tolling applies to Section 2462. Opp. 23 & nn.4-5, 32; *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009); *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008).

Lampf, 501 U.S. at 363. It would be incongruous for it to apply to penalty claims brought by the government, which has tools to discover those violations. The Court also has stated that it has the power to formulate "remedial details" only "[a]part from penal enactments." *Holmberg*, 327 U.S. at 395. The "old chancery rule" applicable to "a plaintiff [who] has been injured by fraud," *id.* at 397 (citation and quotation marks omitted), however, has no place in the penalty/enforcement context where the government seeks to impose "official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *see also Tull*, 481 U.S. at 422. Petitioners' conduct here was no more difficult to detect, and in fact far easier to detect, than the violations of the Toxic Substances Control Act in *3M*, 17 F.3d at 1461, the Export Administration Act in *United States v. Core Labs., Inc.*, 759 F.2d 480, 482-83 (5th Cir. 1985), the Federal Election Campaign Act in *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996), the Surplus Property Act in *United States v. Witherspoon*, 211 F.2d 858, 860 (6th Cir. 1954), or the conduct in *Adams v. Woods*, 6 U.S. (2 Cranch) 336, for that matter.[15]

When a potential defendant obstructs or wrongfully prevents the government from discovering conduct that could support a penalty action, the government does not need equity to lend a hand. The positive law itself

---

[15] The government chides petitioners for not citing in their merits brief the circuit court cases they cited in the petition for certiorari. Opp. 22. Petitioners maintain those decisions are inconsistent with the decision of the court below.

contains a slew of statutes and regulations that require regulated parties to make disclosure and that make it unlawful for a defendant to obstruct an investigation or wrongfully conceal his unlawful activities and prescribe serious sanctions for such conduct, but do not include the revival or preservation of old claims. If the government had wanted petitioners to disclose their conduct to "the fund's investors or to the Commission," Opp. 46, it could have required it—as it did years later; it need not have the courts do its bidding by a kind of federal common law.

Nor do the courts need to make up additional sanctions beyond those Congress establishes to deter a person from engaging in such conduct; if an individual has obstructed an investigation in violation of law, the government can charge him.[16] Nor, where Congress has not provided a penalty or sanction for "concealing" conduct is there warrant for a court of law to substitute its views for those of Congress as to what kinds of concealing conduct are wrongful and what are not.[17] Even a person who engages in illegal conduct need not make that conduct transparent or easy to discover.

---

[16] *See, e.g.*, *United States v. Blackwell*, 459 F.3d 739, 761-62 (6th Cir. 2006); *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006); *In the Matter of EM Capital Mgmt., LLC and Seth Richard Freeman*, Order Instituting Administrative and Cease-and-Desist Proceedings, Investment Advisors Act of 1940 Release No. 3502 (Nov. 20, 2012); *see also, e.g.*, 15 U.S.C. § 80b-4(a); 15 U.S.C. § 80b-7; 18 U.S.C. § 1001; 18 U.S.C. §§ 1501-21 (obstruction of justice); 18 U.S.C. § 1621.

[17] Or for determining whether the government exercised "reasonable diligence." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997).

"Indeed, [even] persuad[ing] a person with intent to . . . cause that person to withhold testimony or documents from a Government proceeding or Government official is not inherently malign." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005) (citation and quotation marks omitted).

Thus, the government enforcement context is singularly distinct from the private civil damages context where the courts have implied principles of equity: unlike a private party seeking damages, the government need not rely on equity to obtain relief from inequitable conduct. And, unlike the private civil damages context, the body of positive law already defines what conduct is wrongfully obstructive and should not be tolerated—and what should be—and defines the penalties Congress thought appropriate for wrongful conduct.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully Submitted,

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
Alida Y. Lasker
Katherine L. Wilson-Milne
Jared M. Gerber
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500
kathleen.massey@dechert.com

Counsel for Petitioners

SUPPLEMENTAL BRIEF

No. 11-1274

IN THE

Supreme Court of the United States

MARC J. GABELLI and BRUCE ALPERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
212-698-3500

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000
lliman@cgsh.com

Counsel for Petitioners

September 10, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 5

TABLE OF AUTHORITIES

Page(s)

Cases

Securities and Exchange Commission v. Obus, No. 10-4749-cv, 2012 WL 3854797 (2d Cir. Sept. 6, 2012) 1, 3-4

United States v. Mayo, 26 F. Cas. 1230 (C.C.D. Mass. 1813) 2

United States v. O'Hagan, 521 U.S. 642 (1997) 3

Statutes

15 U.S.C. § 78j(b) 3

Other Authorities

Robert G. Morvillo & Robert Anello, *Statute of Limitations in SEC Enforcement Actions*, N.Y. L. J. (Online), Apr. 5, 2011 2

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully file this supplemental brief, pursuant to Supreme Court Rule 15.8, to call to the Court's attention a new Second Circuit case that is supportive of the Petition for Certiorari and that was not available at the time Petitioners filed their Reply Brief in Support of the Petition for Certiorari on August 14, 2012. *Securities and Exchange Commission v. Obus*, No. 10-4749-cv, 2012 WL 3854797 (2d Cir. Sept. 6, 2012), highlights the significance of the issue presented by the Petition and illustrates a central fallacy in the Second Circuit's ruling in *Gabelli* and in the Government's argument: as the district court properly recognized, the deception necessary to establish the violation of an antifraud statute is not equivalent to the concealment necessary to invoke equitable tolling, even assuming that doctrine applies to Section 2462. Under the Circuit's rule, anyone would be at peril of a Securities and Exchange Commission ("SEC") penalty fraud claim years after the fact regardless whether there was concealment.

In its opposition to the Petition, the Government argues that Section 2462 incorporates a discovery rule under which "the commencement of the applicable limitations period in cases involving fraud or concealment," Opp. 9 (emphasis added), does not begin to run until the SEC knew or should have

known of the elements of the claim. The premise of the Government's argument, and the Second Circuit's ruling, is that, unlike other claims, as a categorical matter, "fraud claims by their very nature involve self-concealing conduct." Pet. App. 18a; *see also* Opp. 15 (arguing justification for the discovery rule "is that the fraudulent nature of a defendant's offense prevents a plaintiff from knowing that she has been defrauded"). Petitioners have argued that, even assuming that equitable tolling applies when a defendant takes action to conceal a fraud or commits a fraud in a manner that, in the way it is committed, is self-concealing, *but see* Reply 6, that rule asks the wrong question, is legally flawed, and proves too much. It would make the statute of limitations question turn solely on the Government's diligence (and not on whether the defendant engaged in conduct to prevent the Government from discovering the claim), and it would leave open for "eternity" the statute of limitations in all cases brought under anti-fraud statutes or until the Government discovers or should have discovered the violation, Pet. 16, contrary to the long-settled principle that "it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence." *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (Story, J.); *see also* Robert G. Morvillo & Robert Anello, *Statute of Limitations in SEC Enforcement Actions*, N.Y. L. J. (Online), Apr. 5, 2011. Petitioners argue that the Second Circuit's rule improperly equates deception (which is an element of many anti-fraud statutes) with concealment (which some

courts have held tolls the statute of limitations but which is not inherent in every fraud case).

Securities and Exchange Commission v. Obus supports Petitioners' argument. There, the Second Circuit held that to establish a violation of Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), the SEC need not make any "showing of 'deception' beyond the tip itself," *Obus*, 2012 WL 3854797, at *12, because in a case involving insider trading by misappropriation theory, "the act of misappropriation itself is deceitful." *Id.* at *8 (citing *United States v. O'Hagan*, 521 U.S. 642, 653 (1997)). The court further held that evidence an alleged tipper disclosed his use of confidential information would not absolve him of liability for insider trading absent evidence he disclosed that use to the source of the information itself. *Id.* at *6, *14 n.5. In other words, under *Obus*, a Section 10(b) violation is complete when a tip is made without disclosure; it is irrelevant whether the tip is concealed either as part of the violation or thereafter.

As *Obus* highlights, claims for violations of antifraud statutes do not, by definition, involve conduct that is self-concealing and, therefore, are not, by definition, more difficult for the Government to discover than claims under scores of other statutes. The Government, and the court below in *Gabelli*, agree that in order to suspend the running of the statute of limitations for claims under other statutes that do *not* "sound in fraud," the Government would have to allege, and prove, that the defendant took some affirmative act to conceal and

frustrate the Government's ability to bring a timely claim—beyond the violation of the statute itself. The Second Circuit's decision in *Obus* demonstrates that, contrary to the decision below, no different rule should apply when liability is alleged to arise under a statute that is deemed to be an "antifraud statute." That the SEC has alleged a "claim . . . made under the antifraud provisions" of the federal securities laws, Pet. App. 19a, even if that claim is pleaded in accordance with "the pleading standards for fraud," Opp. 17, cannot be sufficient to delay the accrual of the statute of limitations because—as the Second Circuit concluded in *Obus*—the deception sufficient to satisfy an antifraud statute does not require concealment. By holding otherwise, the Second Circuit has established a rule of law, contrary to Section 2462 and in conflict with the decisions of other courts, that would indefinitely extend the statute of limitations even where the defendant took no action to conceal the SEC's claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEWIS J. LIMAN
Counsel of Record
MICHAEL R. LAZERWITZ
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

EDWARD A. MCDONALD
KATHLEEN N. MASSEY
JOSHUA I. SHERMAN
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500

Counsel for Petitioners

September 10, 2012.

SUPPLEMENTAL BRIEF

RECORD AND BRIEFS

No. 11-1274

SUPREME COURT, U.S.
FILED
SEP 21 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARC J. GABELLI and BRUCE ALPERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
212-698-3500

Lewis J. Liman
Counsel of Record
Michael R. Lazerwitz
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000
lliman@cgsh.com

Counsel for Petitioners

September 21, 2012

LIBRARY OF CONGRESS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 2

SUPPLEMENTAL APPENDIX

Petition of the Securities and Exchange Commission, Appellant, For Rehearing En Banc 1sa-28sa

TABLE OF AUTHORITIES

Page(s)

Cases

Securities and Exchange Commission v. Bartek, No. 11-10594, 2012 WL 3205446 (5th Cir. Aug. 7, 2012) 1

Court Filings

Petition of the Securities and Exchange Commission, Appellant, for Rehearing En Banc, *Securities and Exchange Commission v. Bartek*, No. 11-10594, 2012 WL 3205446 (5th Cir. Aug. 7, 2012)..... 1sa

PETITIONERS' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully file this supplemental brief, pursuant to Supreme Court Rule 15.8, to bring to the Court's attention the Securities and Exchange Commission's ("SEC" or "Commission") Petition for Rehearing En Banc in *Securities and Exchange Commission v. Bartek*, No. 11-10594, 2012 WL 3205446 (5th Cir. Aug. 7, 2012), filed September 20, 2012, which is an intervening matter not available to Petitioners at the time of their last filing. In the Petition for Rehearing, the SEC argues (i) that the question whether a discovery rule should be incorporated into Section 2462 "presents issues of continuing importance to the Commission," and (ii) that the *Bartek* decision holding that a discovery rule should not be incorporated into Section 2462 conflicts with the ruling of the Second Circuit's decision in *Gabelli*, which held—on materially indistinguishable facts—that Section 2462 does incorporate a discovery rule. *See* Petition of the Securities and Exchange Commission, Appellant, for Rehearing En Banc, *Bartek*, 2012 WL 3205446 (No. 11-10594), annexed hereto as supplemental appendix, at 10sa; *see also id.* at 23sa-25sa. Thus, the SEC's Petition for Rehearing in *Bartek* further supports Petitioners' positions that certiorari should be granted in *Gabelli* to allow for review of an important and recurring question and because the decision conflicts with the decisions of other

courts of appeals, including the Fifth Circuit, and negates the Government's assertion in its Brief for the Respondent in Opposition that the "decision below does not conflict with any decision of another court of appeals." Opp. 18. For the Court's convenience, a copy of the Petition for Rehearing En Banc is appended to this brief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEWIS J. LIMAN
Counsel of Record
MICHAEL R. LAZERWITZ
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

EDWARD A. MCDONALD
KATHLEEN N. MASSEY
JOSHUA I. SHERMAN
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500

Counsel for Petitioners

September 21, 2012.

SUPPLEMENTAL APPENDIX

No. 11-10594

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

v.

DOUGLAS J. BARTEK and NANCY A. RICHARDSON,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas

PETITION OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLANT, FOR REHEARING EN BANC

MARK D. CAHN
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

HOPE HALL AUGUSTINI
Senior Litigation Counsel

DOMINICK V. FREDA
Senior Litigation Counsel

DAVID LISITZA
Senior Counsel
Securities and Exchange
Commission
100 F Street, N.E.
Washington, D.C. 20549
201-551-5106 (Augustini)

RULE 35 STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

The panel decision conflicts with the following decisions of the Supreme Court and this Court:

Merck v. Reynolds, 130 S.Ct. 1784 (2010)
Holmberg v. Armbrecht, 327 U.S 392 (1946)
Exploration Co. v. U.S., 247 U.S. 435 (1918)
Bailey v. Glover, 88 U.S. 342 (1874)

Blaise D'Antoni & Assoc., Inc. v. SEC, 289 F.2d 276 (5th Cir. 1961)
Mitchell v. Pidcock, 299 F.2d 281 (5th Cir. 1962)
Hodgson v. First Federal Savings and Loan Association of Broward County, Florida, 455 F.2d 818 (5th Cir. 1972)
Mitchell v. Bland, 241 F.2d 808 (5th Cir. 1957)
Texas v. Allan Const. Co., Inc., 851 F.2d 1526 (5th Cir. 1988)

Consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

This case also involves two questions of exceptional importance because they involve issues on which the panel decision conflicts with the following authoritative decisions of other United States Courts of Appeals that have addressed the issues:

SEC v. Gabelli, 653 F.3d 49 (2d Cir. 2011)
SEC v. Koenig, 557 F.3d 736 (7th Cir. 2009)
SEC v. Tambone, 550 F.3d 106, 148-49 (1st Cir. 2008)

SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993)
SEC v. Calvo, 378 F.3d 1211, 1218
(11 th Cir. 2004)

TABLE OF CONTENTS

Statement of Issues Meriting En Banc Consideration 1

Statement of the Case 2

Statement of the Facts 2

Argument on Issue One: An Injunction against Future Violations is Not a Penalty 3

A. Congress authorized injunctive relief as part of a remedial, not punitive, regulatory scheme 3

B. The panel's interpretation is inconsistent with the history of Section 2462 and with traditional principles of equity 7

Argument On Issue Two: The Discovery Rule Delays Section 2462 in Fraud Cases 9

A. The panel decision conflicts with Supreme Court decisions holding that a fraud claim does not accrue until the time the fraud is discovered 9

B. The panel's decision conflicts with other courts of appeals decisions that properly applied the discovery rule to fraud claims under Section 2462 13

Conclusion 15

TABLE OF AUTHORITIES

Cases **Page**

American Chicle Co. v. Topps Chewing Gum, Inc., 210 F.2d 680 (2d Cir. 1954) 4

Associated Securities Corp. v. SEC, 283 F.2d 773 (10th Cir. 1960) 5

Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874) 1, 10, 12, 14, 15

Beck v. SEC, 430 F.2d 673 (6th Cir. 1973) 5

Berko v. SEC, 316 F.2d 137 (2d Cir. 1963) 5

Blaise D'Antoni & Assoc., Inc. v. SEC, 289 F.2d 276 (5th Cir. 1961) 1, 5

Braun v. Sauerwein, 77 U.S. 218 (1869) 12

Capozzi v. United States, 980 F.2d 872 (2d Cir. 1992) 11

Exploration Co. v. United States, 247 U.S. 435 (1918) 1, 10, 12, 14

Franconia Associates v. United States, 536 U.S. 129 (2002) 11

Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) 9

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 4

Hodgson v. First Federal Savings and Loan Association of Broward County, Florida, 455 F.2d 818 (5th Cir. 1972) 1,4

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 1, 7, 8, 9, 10, 14

Jackson v. Speer, 974 F.2d 676 (5th Cir. 1992) 12

Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996) . . .6

Jones v. Van Doren, 130 U.S. 684 (1889) 10

Kirby v. Lake Shore, 120 U.S. 130 (1887) . . .10, 12

Lampf v. Gilbertson, 501 U.S. 350 (1990) 9

Meeker v. Lehigh Valley RR Co., 236 U.S. 412 (1915) 3

Mercer v. Seldon, 42 U.S. 37 (1843) 11

Merck & Co. v. Reynolds, 130 S. Ct. 1784 (2010) 1, 9, 10, 13, 14

Mitchell v. Bland, 241 F.2d 808 (5th Cir. 1957) 1, 4

Mitchell v. Pidcock, 299 F.2d 281 (5th Cir. 1962) 1, 4

Pierce v. SEC, 239 F.2d 160 (9th Cir. 1956) 5

Prevost v. Gratz, 19 U.S. 481 (1821) 8

Restrepo v. Attorney General, 617 F.3d 787 (3d Cir. 2010) 11

Riordan v. SEC, 627 F.3d 1230 (D.C. Cir. 2010) 7

SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677 (10th Cir, 1988) 4

SEC v. Calvo, 378 F.3d 1211
(11th Cir. 2004) 8, 9

SEC v. Gabelli, 653 F.3d 49
(2d Cir. 2011) 1, 2, 13, 14, 15

SEC v. Jasper, 678 F.3d 1116
(9th Cir. 2012) 3

SEC v. Koenig, 557 F.3d 736
(7th Cir. 2009) 2, 13, 14

SEC v. Ralston Purina Co.,
346 U.S. 119 (1953) 4

SEC v. Rind, 991 F.2d 1486
(9th Cir. 1993) 4, 8, 9

SEC v. Tambone, 550 F.3d 106
(lst Cir. 2008) 2, 8, 14, 15

Sherwood v. Sutton, 21 F. Cas. 1303
(C.C.N.H. 1828) 10

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 9

Texas v. Allan Constr. Co., 851 F.2d 1526
(5th Cir. 1988) 15

Tull v. United States, 481 U.S. 412 (1987) 5, 7

United States v. Borin, 209 F.2d 145
(5th Cir. 1954) 12

United States v. Core Laboratories, Inc.,
759 F.2d 480 (5th Cir. 1985) 12, 13

United States v. Halper, 490 U.S. 435
(1989) 6

United States v. Kontny, 238 F.3d 815 (7th Cir. 2001) 15

United States v. Naftalin, 606 F.2d 809 (8th Cir. 1979) 5

United States v. Providence Journal Co., 485 U.S. 693 (1988) 11

United States v. Reyes, 660 F.3d 454 (9th Cir. 2011) 3

United States v. Treacy, 639 F.3d 32 (2d Cir. 2011) 3

Upton v. McLaughlin, 105 U.S. 640 (1881) 10

STATUTES AND RULES

Securities Act of 1933, 15 U.S.C. 77a, et seq.

Section 20(d), 15 U.S.C. 77t(d) 5
Section 20(e), 15 U.S.C. 77t(e) 5

Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq.

Section 21 (d)(1), 15 U.S.C. 78u(d)(1) 5
Section 21 (d) (2), 15 U.S.C. 78u(d)(2) 5
Section 21 (d) (3), 15 U.S.C. 78u(d)(3) 5
Section 21 (e), 15 U.S.C. 78u(e) 5
28 U.S.C. 2462 . . . . . .1, 2, 6, 7, 9, *passim*

MISCELLANEOUS

H.R. Rep. No. 98-355 (1984) 5
H.R. Rep. No. 100-910 (1988) 5
S.Rep. No. 101-337 (1990) 6

STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

A panel of this Court has affirmed dismissal of the Securities and Exchange Commission's claims for civil money penalties and injunctive relief, holding that they were barred by the five-year statute of limitations in 28 U.S.C. 2462 for civil penalties. This decision, which presents issues of continuing importance to the Commission, is contrary to Supreme Court precedent and conflicts with decisions of this Court and other courts of appeals. The decision, although unpublished, is also being cited to the Supreme Court in another case as presenting a conflict warranting a grant of certiorari. *See SEC v. Gabelli*, No. 11-1274, petition for certiorari (pending).

En banc rehearing should be granted to address two panel rulings that would deprive investors of important securities law protection: *First*, acting contrary to this Court's own precedent and alone among the courts of appeals, the panel held that an injunction to obey the law is punitive and not remedial.[1] *Second*, the panel refused to apply the fraud discovery rule to Section 2462, a rule long recognized by the Supreme Court and read into every federal statute of limitations unless Congress spec-

---

[1] *See Blaise D'Antoni & Assoc., Inc. v. SEC*, 289 F.2d 276 (5th Cir. 1961); *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962); *Hodgson v. First Federal Savings and Loan Association of Broward County, Florida*, 455 F.2d 818, 827 (5th Cir. 1972); *Mitchell v. Bland*, 241 F.2d 808, 810 (5th Cir. 1957). *See also* cases *infra*, n.6 and p.8.

ifies otherwise.[2] The panel's refusal conflicts with three recent court of appeals decisions that properly applied the fraud discovery rule to Section 2462 in Commission enforcement actions.[3]

STATEMENT OF THE CASE

The Commission brought this action seeking permanent injunctions, officer and director bars, and civil money penalties for violations of antifraud provisions of the federal securities laws. A panel of this Court affirmed the district court's dismissal on summary judgment of the Commission's claims for relief as barred by the five-year statute of limitations in 28 U.S.C. 2462—a catch-all statute of limitations which provides that an action for a "civil penalty" must be "commenced within five years from the date when the claim first accrued * * *."

STATEMENT OF THE FACTS

This case involves two senior corporate officers who falsified and signed financial statements that overstated corporate income in public filings. From 2000 through 2003, defendant Bartek, Microtune's Chief Executive Officer, and defendant Richardson, Microtune's Chief Financial Officer and General

---

[2] *Merck v. Reynolds*, 130 S.Ct. 1784 (2010); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Exploration Co. v. U.S.*, 247 U.S. 435 (1918); *Bailey v. Glover*, 88 U.S. 342 (1874).

[3] *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011); *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009); *SEC v. Tambone*, 550 F.3d 106, 148-49 (1st Cir. 2008).

Counsel, directed the grant of stock options to company executives without recording the appropriate compensation expense. Defendants falsified the dates that the options were granted, and the resulting failure to record the proper compensation expense overstated the company's reported net income by as much as 77%. This is a well-established form of fraud.[4] The Commission and Microtune's shareholders did not learn of defendants' fraud until 2006 when the company issued a restatement. The Commission filed its complaint in 2008.

ARGUMENT ON ISSUE ONE: An Injunction against Future Violations is Not a Penalty.

A. Congress authorized injunctive relief as part of a remedial, not punitive, regulatory scheme.

The panel's holding that an injunction ordering the defendants to obey securities law provisions in the future was a "penalty" subject to Section 2462 is without precedent. In focusing solely on whether such an injunction would have a "stigmatizing effect" on the defendants, the panel ignored the relevant inquiry as required by the Supreme Court under Section 2462—whether Congress intended injunctions against future violations of the securi-

[4] *See SEC v. Jasper*, 678 F.3d 1116 (9th Cir. 2012); *United States v. Reyes*, 660 F.3d 454 (9th Cir. 2011); *United States v. Treacy*, 639 F.3d 32 (2d Cir. 2011).

ties laws to be "punitive" or "remedial." This requires an analysis of the nature of the remedy as determined by the statutory scheme. *Meeker v. Lehigh Valley RR Co.*, 236 U.S. 423-34 (1915) (interpreting Section 2462). Under this analysis, injunctions against future violations are remedial and therefore not a penalty under Section 2462.

This is confirmed by decisions of this Court and others. As this Court stated in *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962), "The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the [Fair Labor Standards] Act requires anyway—to comply with the law." *See also Hodgson v. First Federal Savings and Loan Association of Broward County, Florida*, 455 F.2d 818, 827 (5th Cir. 1972) (same). This is consistent with "[t]he historic injunctive process [which] was designed to deter, not punish." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). "The nature of injunctive relief is that it is prospective, prophylactic, preventative,—not punitive." *Mitchell v. Bland*, 241 F.2d 808, 810 (5th Cir. 1957). *See also American Chicle Co. v. Topps Chewing Gum, Inc.*, 210 F.2d 680, 683 (2d Cir. 1954) ("[A]n injunction is protection for the future and not punishment for the past.").

Congress authorized injunctive relief for securities fraud as part of a remedial, not punitive, scheme. The remedial purpose of the securities laws is to protect the investing public. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953). Congress made an injunction a principal remedy under the federal securities laws to ensure future

compliance,[5] and Commission enforcement of the securities laws is intended to be remedial, not punitive.[6]

Congress's enactments since introducing the securities laws in the 1930s confirms this understanding. In 1984 Congress authorized the Commission to seek—for the first time—civil money penalties as an additional sanction for insider trading. Before then, "[t]he principal, and often effectively only, remedy available to the Commission against insider trading [was] an injunction against further violations of the securities laws and disgorgement of illicit profits, [which serves] only a *remedial function* and *does not penalize* a defendant for the illegal conduct." H.R. Rep. No. 98-355 at *7-8 (1984) (emphasis added). *See also* H.R. Rep. No. 100-910 at *11 (1988) (same).

That Congress does not equate injunctive relief with civil penalties is also shown by the statutory structure. Penalties and injunctive relief are authorized in separate provisions. *See, e.g.*, 15

---

[5] *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (Commission enforcement action is designed to expeditiously safeguard the public interest by enjoining securities violations"); *SEC v. Blinder, Robinson & Co., Inc*, 855 F.2d 677, 680 (10th Cir. 1988) (an injunction protects the integrity of the securities industry).

[6] *Beck v. SEC*, 430 F.2d 673, 674 (6th Cir. 1973); *Berko v. SEC*, 316 F.2d 137, 141 (2d Cir. 1963); *Associated Securities Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960); *Pierce v. SEC*, 239 F.2d 160, 163 (9th Cir. 1956); *Blaise D'Antoni & Assoc., Inc. v. SEC*, 289 F.2d 276 (5th Cir. 1961); *United States v. Naftalin*, 606 F.2d 809, 812 (8th Cir. 1979).

U.S.C. 77t(d) and (e); 15 U.S.C. 78u(d) (1-3) and (e). *See Tull v. United States*, 481 U.S. 412, 425 (1987) (finding that a statute "does not intertwine equitable relief with the imposition of civil penalties" when "each kind of relief is separably authorized in a separate and distinct statutory provision"). Congress has itself noted the distinction between injunctions and civil money penalties, stating that courts have "flexibility to order injunctive or other equitable relief only, injunctive or other equitable relief and a penalty, or a penalty only, depending upon the facts of a particular case." S. Rep. No. 101-337 at 22 (1990).[7]

The panel disregarded this statutory scheme when it focused solely on the "stigmatizing" collateral effect that an injunction would have on defendants. And it misconstrued the statement in *United States v. Halper*, 490 U.S. 435 (1989), that "even remedial sanctions carry the sting of punishment." *Halper's* point was that even remedial sanctions sting and the defendant's perspective does

---

[7] Due to space limitations, this petition emphasizes the argument that injunctions *against future violations* are not penalties. But the same analysis applies to *officer and director bars*, which are likewise a form of injunction. In explicitly authorizing such bars, Congress believed that courts already had "inherent power" to impose bars as within a court's historic equitable jurisdiction to award injunctive relief. S. Rep. No. 101-337. Congress could not have thought an officer and director bar was a penalty because a court does not have "inherent power" to impose a penalty in the absence of Congressional directive. The panel thus likewise erred in concluding that such bars are penalties.

not provide the dividing line between a punitive sanction and a remedial one.

The panel also relied on *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), in which the D.C. Circuit applied Section 2462 to time-bar a suspension from the securities industry. The Commission adheres to its view that *Johnson* was wrongly decided. But *Johnson* provides no support for the panel's decision that enjoining future violations is a punitive sanction. 87 F.3d at 489 (noting that the sanction would less resemble punishment if it focused on current competence or degree of risk petitioner posed in the future). Indeed, in 2010, even the D.C. Circuit rejected the argument that an order to comply with the securities laws in the future is a "penalty" covered by Section 2462. *See Riordan v. SEC*, 627 F.3d 1230, 1234-35 (2010) (holding that a cease-and-desist order, which "simply requires [defendant] not to violate the relevant securities laws in the future," is "purely remedial and preventative" and not a "penalty" covered by Section 2462.).

B. The panel's interpretation is inconsistent with the history of Section 2462 and with traditional principles of equity.

Given that the historical antecedents of Section 2462 date from 1799—when legal and equitable jurisdiction were clearly understood as separate—Congress would not have used "penalty" to connote injunctive relief. Civil penalties exact punishment, a remedy historically available only in courts of

law. *Tull,* 481 U.S. at 423 n.7 (1987). In contrast, a court of equity had exclusive jurisdiction to award injunctive relief, and could not impose civil penalties. *Id.* at 424. Congress would not have understood Section 2462's "civil fine, penalty, or forfeiture"—relief available only at law—as encompassing an equitable remedy—an injunction—available only in equity. *See Holmberg,* 327 U.S. at 395 (when Congress leaves to federal courts to formulate equitable relief, it does not expect courts "to break with historical principles of equity in the enforcement of federally-created equitable rights.")

Moreover, there is no basis for concluding that Congress would have enacted a statute of limitations for injunctive relief at all. "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief." *Holmberg,* 327 U.S. at 396. "Equity eschews mechanical rules" and "depends on flexibility." *Id.* The need to protect the public from future misconduct—the predicate for an injunction prohibiting future violations—is not automatically vitiated by passage of time after the fraud (especially when, as here, a successful fraud lies undetected for some years). *See Prevost v. Gratz,* 19 U.S. 481, 498 (1821)(length of time a fraud is undiscovered can be an aggravating factor requiring relief). A statute of limitations prevents equity from considering whether relief is warranted under the circumstances and so "a suit in equity may lie though a comparable cause of action at law would be barred." *Holmberg,* 327 U.S. at 396.

Consistent with the foregoing, Congress did not impose any time limit on the Commission's author-

ity to seek injunctive relief, as three courts of appeals have already concluded. *See Tambone,* 550 F.3d at 148-49 (Section 2462 does not apply to injunctive relief); *Rind,* 991 F.2d at 1492 (no statute of limitations for injunctive relief); *SEC v. Calvo,* 378 F.3d 1211, 1218 (11th Cir. 2004) (same). As these courts recognize, imposing a limitations period on the Commission's actions "would conflict with the underlying policies of the securities laws" to protect the public interest by enjoining securities violations. This purpose negates "any inference that Congress intended a limitations period to apply." *Rind,* 991 F.2d at 1491-92. Moreover, since Congress "clearly devoted its time and attention to limitation issues for private securities law claims," the absence of an express limitation for Commission actions, "therefore, must be interpreted as deliberate." *Id.* at 1490; *see also Calvo,* 378 F.3d at 1218. Applying Section 2462 to bar injunctive relief conflicts with these decisions.

ARGUMENT ON ISSUE TWO: The Discovery Rule Delays Section 2462 in Fraud Cases.

Because no statutory language expressly requires application of the fraud discovery rule here, the panel held that the Commission's penalties claims "accrued" under Section 2462 when defendants committed the fraud. This is contrary to Supreme Court precedent, and conflicts with decisions in other circuits.

A. The panel decision conflicts with Supreme Court decisions holding that a fraud claim does not accrue until the time the fraud is discovered.

The Supreme Court recently reaffirmed the rule, now centuries old, that, in a fraud case, "the bar of the statute does not begin to run until the fraud is discovered." *Merck*, 130 S.Ct. at 1794 (quoting *Holmberg*, 327 U.S. at 397). This "venerable principle," *Lampf v. Gilbertson*, 501 U.S. 350, 363 (1990), an "historic exception for suits based on fraud," *TRW, Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring), derives from "the maxim that no man may take advantage of his own wrong," *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959). The Supreme Court has uniformly applied the fraud discovery rule since 1874. *See, e.g., Bailey v. Glover*, 88 U.S. 342, 349 (1874).[8]

The panel held that the discovery rule does not apply to Section 2462 because "Congress did not include language to toll the statute based on an accrual discovery rule." The governing law, however, is the opposite. The Supreme Court has instructed that the discovery rule is read into statutes of limitations for fraud claims, *unless* Congress specifies otherwise. *Holmberg*, 327 U.S.

---

[8] *See also Upton v. McLaughlin*, 105 U.S. 640, 642-44 (1881); *Kirby v. Lake Shore*, 120 U.S. 130, 138 (1887); *Jones v. Van Doren*, 130 U.S. 684,692-93 (1889); *Holmberg*, 327 U.S. at 397; *Exploration Co.*, 247 U.S. at 449; *Merck*, 130 S.Ct. at 1796.

at 397 (explaining that the fraud discovery rule is "read into every federal statute of limitation"). The Supreme Court has applied the fraud discovery rule to limitations periods that did *not* include express discovery language. *See Bailey*, 88 U.S. at 346 (applying discovery rule to a statute of limitations that ran "from the time when the cause of action accrued"); *Exploration Co.*, 247 U.S. at 447 (applying discovery rule to statute of limitations that ran from date that land patent was issued).

The fraud discovery rule was adopted to act "in mitigation of the strict letter of general statutes of limitation" precisely because the relevant statutes of limitations afforded no express exception from their terms. *Bailey*, 88 U.S. 346; *see also Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) (Story, J.) (fraud "form[s] an implied exception, to be acted upon by courts of law and equity"). There would be no need for an exception if the statute of limitations made explicit provision for fraud claims. The panel's decision conflicts with this authority.

Nor does the statute's term *"first* accrued" (emphasis added) support the panel's conclusion. "First accrues" in a statute of limitations is "unexceptional," and does not mean that suits must be filed on "the earliest possible date." *Franconia Associates v. United States*, 536 U.S. 129, 144-145 (2002). The panel likewise misread the phrase at the beginning of Section 2462, "[e]xcept as otherwise provided by Act of Congress," as foreclosing the discovery rule. Congress's use of this phrase merely indicates that Section 2462 is a "catch-all"

statute of limitations for a variety of claims, and that this "general rule" is overridden by a statute of limitations for specific claims. *United States. v. Providence Journal Co.*, 485 U.S. 693, 1509 (1988).[9]

Similarly, the panel erroneously held that no exception other than that explicitly mentioned in Section 2462—when the defendant "is outside of the United States"—operates to delay accrual. But this Court permits a plaintiff to argue that the defendant's absence from the jurisdiction delays accrual of a fraud claim based on explicit statutory language *and* to simultaneously argue that accrual was delayed because the "statute of limitations begins to run from the time the fraud is discovered." *Jackson v. Speer*, 974 F.2d 676, 678-680 (5th Cir. 1992). "The running of a statute of limitation may be suspended by causes not mentioned in the statute itself," *Braun v. Sauerwein*, 77 U.S. 218, 223 (1869).

The panel's belief that this case was controlled by *United States. v. Borin*, 209 F.2d 145 (5th Cir. 1954), and *United States v. Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985), rests on an interpretation of those cases that conflicts with Supreme Court precedent.

Citing *Borin*, the panel found that the discovery rule does not apply to Section 2462 because it is "'explicit in commanding' at what moment a suit

---

[9] *See, e.g., Restrepo v. Attorney General*, 617 F.3d 787, 800-801 (3d Cir. 2010) (refusing to apply Section 2462's "'catch-all' statute of limitations" to immigration proceedings); *Capozzi v. United States*, 980 F.2d 872, 874-76 (2d Cir. 1992) (same, tax assessments).

must be brought." But the False Claims Act limitations in *Borin* ran from "the commission of the act," and included an express negative cut-off—"and not afterward." 209 F.2d at 147. This Court found that this "emphatic language" rendered the discovery rule inapplicable. *Id.* at 147-48. In contrast, Section 2462 does not run from a specific *event*, but generally from when a claim *"accrues."* As the Supreme Court has repeatedly held, a fraud claim "accrues" only after the fraud is discovered.[10] Nor does Section 2462 include the limiting phrase "and not afterward."

And contrary to the panel's view that this Court in *Core Labs* "already held that the discovery rule does not apply to this statute," *Core* says nothing about the fraud discovery rule because it was not raised in the case. *Core's* comment that courts have construed Section 2462 to accrue upon a violation merely expresses the general principle that accrual ordinarily occurs when a claim comes into existence. The fraud discovery rule is an exception to this general principle. The panel's reading of *Core* thus conflicts with binding and well-settled Supreme Court precedent.

---

[10] *See Bailey*, 88 U.S. at 346 (applying discovery rule when the action must be brought "within two years from the time when the cause of action *accrued*"); *Exploration Co.*, 247 U.S. at 449 (finding action not "to have *accrued* until the discovery of the fraud"); *Kirby*, 120 U.S. at 138 (deeming action to *accrue* when the fraud was or should have been discovered).

B. The panel's decision conflicts with other courts of appeals decisions that properly applied the discovery rule to fraud claims under Section 2462.

The panel's decision creates a split with other courts of appeals. *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011), followed *Merck* in holding that the accrual of the Commission's fraud claim under Section 2462 is determined by the "fraud-based discovery rule," which "'delays accrual of a cause of action until the plaintiff has discovered it.'" *Id.* at 59 *(quoting Merck)*. *Gabelli* found it "unnecessary for Congress to expressly mention the discovery rule in the context of fraud claims, given the presumption that the discovery rule applies to these claims unless Congress directs otherwise." *Id* at 60. *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009), likewise held that the accrual of the Commission's fraud claim under Section 2462 is determined by the "special rule for fraud, a concealed wrong," such that a "claim for fraud accrues only on its discovery." *Id.* at 739. *Koenig* found that the Supreme Court "establish[ed] a norm that federal statutes of limitations do not begin to run until the claim has been discovered." *Id. See also Tambone*, 550 F.3d at 148-49 (Section 2462 did not begin to run until the Commission could discover the fraud).

The panel distinguished *Gabelli* and *Koenig*, and the Supreme Court cases they applied, as relying on "equitable principles"—such as fraudulent concealment or equitable tolling—purportedly to the exclusion of the fraud discovery rule. But those

decisions (and *Tambone)* did apply the fraud discovery rule, and held that Section 2462 did not begin to run until the Commission could discover the fraud. *Gabelli,* 653 F.3d at 59 (relying on *Merck); Koenig,* 557 F.3d at 739 (relying on *Bailey, Holmberg* and *Exploration Co.); Tambone,* 550 F.3d at 148-49. As *Merck* makes clear, the discovery rule is an equitable principle for fraud cases "where a defendant's deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded." Without such a rule, "'the law which was designed to prevent fraud' could become 'the means by which it is made successful and secure.'" *Merck,* 130 S. Ct. at 1793-94 *(quoting Bailey).*[11]

Nor did the Commission have to demonstrate fraudulent concealment—an act, separate from the fraud, that conceals the fraud. *Bailey,* 88 U.S. at 348 (fraud discovery rule applies "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it.") As this Court has acknowledged, "[f]raud is, by its very nature, self-concealing." *Texas v. Allan Const.*

---

[11] *Bailey, Holmberg* and *Exploration Co.* do not use the term "discovery rule" in describing the relevant doctrine: "[W]here a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Bailey,* 88 U.S. at 348. But *Merck* clearly calls this the discovery rule. Regardless of the label, however, the Commission clearly invoked *Bailey* and its principle applies to this case. *Koenig,* 557 F.3d at 739 (explaining the doctrine, noting that the particular label attached "is unimportant in practice.")

Co., Inc., 851 F.2d 1526, 1529 (5th Cir. 1988).[12] The Commission established that the defendants "committ[ed] a fraud in a manner that it concealed itself" *(Bailey*, 88 U.S at 349-50), and the panel's suggestion otherwise is incorrect.[13] This deceptive conduct is no more or less concealed than the fraudulent schemes in *Gabelli* (failure to disclose conflict of interest) and *Koenig* (fraudulent accounting schemes).

---

[12] *See also Gabelli*, 653 F.3d at 59 ("fraud claims by their very nature involve self-concealing conduct"); *SEC v. Tambone*, 550 F.3d at 148-49 (delaying limitations because of the "self-concealing nature of defendants' conduct"); *United States v. Kontny*, 238 F.3d 815, 820 (7th Cir. 2001) ("fraud is by nature self-concealing").

[13] Far from conceding there was no self-concealing fraud, the Commission *affirmatively argued* that the fraud was self-concealing. Oct. 29, 2010 Hearing transcript, R.171 at 17 ("The fraud was self-concealing. It manifested itself in false filings that the SEC has no reason to suspect were not truthful."). *See also* Reply Br. 7 ("In arguing that the fraud here was not self-concealing, defendants ignore that the Commission's action was based on fraud that was inherently concealed: misrepresentations in public reports that materially overstated the company's income and understated expenses.")

CONCLUSION

Rehearing en banc should be granted.

Respectfully submitted,

MARK D. CAHN
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

s/ Hope Hall Augustini
HOPE HALL AUGUSTINI
Senior Litigation Counsel

DOMINICK V. FREDA
Senior Litigation Counsel

DAVID LISITZA
Senior Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
202-551-5106 (Augustini)

September 20, 2012

Certificate of Service

SEC v. Douglas J Bartek and Nancy A. Richardson

No. 11-10594

I hereby certify that, on September 20, 2012 I served by electronic filing the Petition of the Securities and Exchange Commission, Plaintiff-Appellant, for Rehearing En Banc on the following:

Ronald Wayne Breaux
Nina Cortell
Lawrence A. Gaydos
Jeremy Daniel Kernodle
Emily W. Westridge
Haynes & Boone, L.L.P.
2323 Victory Avenue
Dallas, TX 75219

Zeno Benjamin Baucus
Rachel M. McKenzie
Rebecca Lynn Mroz
Orrick, Herrington
& Sutcliffe, L.L.P.
1152 15th Street, N.W.
Columbia Center
Washington, DC 20005

E. Joshua Rosenkranz
Orrick, Herrington
& Sutcliffe, L.L.P.
51 W. 52nd Street
New York, NY 10019-6142

Susan Diane Resley
Morgan, Lewis & Bockius, L.L.P.
1 Market
Spear Street Tower
San Francisco, CA 94105-1596

Edward Parsons Davis, Jr.
Orrick, Herrington
& Sutcliffe, L.L.P.
Building 1040
1000 Marsh Road
Menlo Park, CA 94025-0000

Justin Myer Lichterman
Orrick, Herrington
& Sutcliffe, L.L.P.
405 Howard Street
Orrick Building
San Francisco, CA 94105

Lewis J. Liman
Cleary Gottlieb Steen
& Hamilton
1 Liberty Plaza
New York, NY 10006-0000

s/ Hope Hall Augustini

Senior Litigation Counsel
Securities and Exchange
Commission
100 F St., N.E.
Washington, D.C. 20549
202-551-5106

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 16 2012
OFFICE OF THE CLERK

No. 11-1274

In The
Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

THOMAS PINDER
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

CLIFFORD M. SLOAN
Counsel of Record
JOSEPH L. BARLOON
ANAND S. RAMAN
RAY D. MCKENZIE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
cliff.sloan@skadden.com

Counsel for Amicus Curiae

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Ruling Below Undermines the Principle of Repose. 3

II. The Ruling Below Undermines the Principle of Preventing the Difficulties of Stale Claims 11

III. The Ruling Below Undermines the Principle of Judicial Efficiency. 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 5, 10

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 2

Agency Holding Corp. v. Malley-Duff & Associates, Inc.,
483 U.S. 143 (1987) 9, 17

Badaracco v. Commissioner,
464 U.S. 386 (1984) 6

Board of Regents v. Tomanio,
446 U.S. 478 (1980) 4

Bell v. Morrison,
26 U.S. 351 (1828) 4, 11, 17

Burnett v. Grattan,
468 U.S. 42 (1984) 15

Burnett v. New York Central Railroad Co.,
380 U.S. 424 (1965) 4, 11, 15

Cooey v. Strickland,
479 F.3d 412 (6th Cir. 2007) 16

Day v. McDonough,
547 U.S. 198 (2006) 15

FEC v. Williams,
104 F.3d 237 (9th Cir. 1996) 10

FTC v. Standard Oil Co. of California,
449 U.S. 232 (1980) 14

Guaranty Trust Co. v. United States,
304 U.S. 126 (1938) 2, 5, 6, 7

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 4, 15

Klehr v. A.O. Smith Corp.,
521 U.S. 179 (1997) 10

M'Cluny v. Silliman,
28 U.S. 270 (1830) 4

McCann v. Hy-Vee, Inc.,
663 F.3d 926 (7th Cir. 2011) 7

Northern Metal Co. v. United States,
350 F.2d 833 (3d Cir. 1965) 6

Order of Railroad Telegraphers v. Railway Express Agency,
321 U.S. 342 (1944) 4

Panetti v. Quarterman,
551 U.S. 930 (2007) 15

SEC v. Bartek,
No. 11-10594, 2012 WL 3205446
(5th Cir. Aug. 7, 2012) 10

Trawinski v. United Technologies,
313 F.3d 1295 (11th Cir. 2002) 10

United States v. Core Laboratories, Inc.,
759 F.2d 480 (5th Cir. 1985) 5, 6, 7, 10

United States v. Hughes House Nursing Home, Inc.,
710 F.2d 891 (1st Cir. 1983) 6

United States v. Kubrick,
444 U.S. 111 (1979) 2, 12

United States v. Mayo,
1 Gall. 396, 26 F. Cas. 1230
(C.C.D. Mass. 1813) (No. 15,755) 10

United States v. Witherspoon,
211 F.2d 858 (6th Cir. 1954) 10

Wilson v. Garcia,
471 U.S. 261 (1985) 4, 9, 11, 16, 17

Wood v. Carpenter,
101 U.S. 135 (1879) 4

STATUTES

2 U.S.C. § 1606(a) 8

7 U.S.C. § 9(10)(a) 8

7 U.S.C. § 13a 8

12 U.S.C. § 1703(b)(7) 8

12 U.S.C. § 1735f-14(b) 8

12 U.S.C. § 1818(i) 8

15 U.S.C. § 45(m)(1)(A) 8

15 U.S.C. § 1691 8

18 U.S.C. § 1034(a) 8

19 U.S.C. § 1593a(c)(1) 9

20 U.S.C. § 1082(g) 9

22 U.S.C. § 3105(a) 9

31 U.S.C. § 5330(e) 9

38 U.S.C. § 3710(g)(4) 9

50 U.S.C. § 2401 *et seq.* 5

REGULATIONS

12 C.F.R. § 219.24 13

31 C.F.R. § 1010.306 13

31 C.F.R. § 1010.420 13

31 C.F.R. § 1010.430 13

31 C.F.R. § 1010.630 13

OTHER AUTHORITIES

James W. Beasely, Jr., *Report of the Task Force on Statute of Limitations for Implied Actions by the Committee on Federal Regulation of Securities*, 41 Bus. Law. 645 (1986) 9

Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 B.Y.U. L. Rev. 1371 (2011) 14, 15

Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950) 5

FDIC, Annual Report (Apr. 30, 2012) 8

Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380 (1973) 14

Robinson B. Lacy, *Adverse Publicity and SEC Enforcement Procedure*, 46 Fordham L. Rev. (1977) 14

OCC, Annual Report (Nov. 3, 2011) 7

Mark T. Roche, Sean C. Adams & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, 44 Secs. Reg. & L. Rep. 1415 (BNA) (July 23, 2012) 10

Note, *SEC Enforcement Suits*,
94 Mich. L. Rev. 512 (1996) 9

U.S. Department of Justice, Attorney General's 2011 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976 (March 2012) 8

Robert F. Zielinski & Vito Petretti, *Records Retention: What Banks Don't Know Can and Likely Will Hurt*,
119 Banking L.J. 350 (2002) 13

INTEREST OF *AMICUS CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA, whose members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all forms of consumer financial services, often appears as *amicus curiae* in litigation that affects the banking industry. As a result of their function and recordkeeping responsibilities, banks and their subsidiaries are often involved, directly or indirectly, in litigation arising from the Government seeking civil monetary penalties. Accordingly, the ABA has a strong interest in the Court's interpretation of the statute of limitations for such actions, and the statutory provision at issue in this case.[1]

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Letters from Petitioners and Respondent giving blanket consent for the filing of *amicus* briefs are on file with the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case poses a fundamental question about the interpretation of Congress's rule limiting the time in which government agencies may bring actions seeking civil fines, penalties, or forfeitures.

From the beginning of the Republic, our courts have recognized the vital role that statutes of limitations play in any enlightened system of justice, including our own. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Guar. Trust Co. v. United States*, 304 U.S. 126, 136 (1938); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). Courts repeatedly have recognized that the legislature strikes a balance between plaintiffs' valid right to vindication and defendants' reasonable right to repose. *See, e.g.*, *Kubrick*, 444 U.S. at 117. In reaching this balance, Congress necessarily contemplates the principles that justify statutes of limitations: (1) providing repose to potential defendants by encouraging potential plaintiffs to bring claims on a timely basis; (2) protecting defendants and courts from the prejudice caused by stale claims and deteriorated evidence; and (3) fostering judicial efficiency.

These goals and values are especially significant with regard to the limitations period for government agencies to bring actions for civil fines, penalties, or forfeitures. As courts have long recognized, Congress struck an important balance in Section 2462 of Title 28 of the United States Code and its predecessors, which generally gives government agencies five years to institute such enforcement actions (unless a more specific statutory limitation applies).

For the reasons stated by Petitioners, the interpretation of Section 2462 applied by the court below is inconsistent with the statute's plain language, structure, and history. Grafting a government "discovery" rule onto Section 2462 for violations that allegedly "sound in fraud" threatens a sea change in well-settled law about how to apply Section 2462's check on the Government's power to punish individuals and entities through civil enforcement penalties.

Amicus takes allegations of fraud seriously and recognizes and supports the Government's strong interest in combatting fraud. At the same time, *amicus* believes that the bright line Congress drew in adopting a generally applicable deadline serves a vitally important role in the administration of justice, and that it brings stability and certainty to the law. Predictability and consistency benefit all involved, including banks, which operate in a highly regulated industry and are often called on to provide discovery during investigations governed by Section 2462.

The Second Circuit's ruling substantially undercuts the values and goals served by Section 2462 (and, indeed, all statutes of limitations). To prevent the uncertainty and instability that it threatens for individuals and institutions, the holding below should be reversed.

ARGUMENT

I. The Ruling Below Undermines the Principle of Repose.

Statutes of limitations serve the vital function of providing repose. As this Court repeatedly has recognized, statutory limitations provide repose to

potential defendants by requiring potential plaintiffs to bring causes of action in a timely manner. *See, e.g., M'Cluny v. Silliman*, 28 U.S. 270, 279 (1830) ("By requiring those who complain of injuries to seek redress, by action at law, within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation."); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("An important public policy lies at the[] foundation [of limitations statutes]. They stimulate to activity and punish negligence."); *Bell v. Morrison*, 26 U.S. 351, 360 (1828) (explaining that statute of limitations should be interpreted to be "what it was intended to be, emphatically, a statute of repose"). As this Court explained: "Statutes of limitations . . . in their conclusive effects are designed to promote justice by preventing surprises . . . . The theory is . . . that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) ("Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims."); *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten."); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("[T]here comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely . . . to upset settled expectations that a substantive claim will be barred . . . ."); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber. . . .'") (quoting *Order of R.R. Telegraphers*, 321 U.S. at

348-49); *Guar. Trust Co.*, 304 U.S. at 136 ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court . . . as a meritorious defense, in itself serving a public interest."); *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) ("Statutes of limitations also reflect the judgment that there comes a time when the potential defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations[.]'") (quoting Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950)).

Over a quarter of a century ago, in *United States v. Core Laboratories*, 759 F.2d 480, 481 (5th Cir. 1985), the Fifth Circuit recognized that allowing *the Government's* actions to supply the triggering event for Section 2462 would severely undermine the principle of repose. There, the Commerce Department brought an administrative action against Core Laboratories for alleged violations of the Export Administration Act, 50 U.S.C. § 2401 *et seq.* 759 F.2d at 481. When Core Laboratories refused to pay the penalty, the Commerce Department sued to enforce the penalty. *Id.* Core Laboratories asserted that, because more than five years had passed since the last alleged violation, the action was barred by Section 2462. *Id.* In response, the Government averred that its claim "accrued" when it sought civil penalties in the administrative action. The district court disagreed and dismissed the case. *Id.*

In affirming the district court, the Fifth Circuit explained:

> The progress of administrative proceedings is largely within the control of the Government. The [G]overnment is exempt from the consequences of its laches (quod nullum tempus occurrit regi). A limitations period that began to run only after the [G]overnment concluded its administrative proceedings would thus amount in practice to little or none.

Id. at 482-83 (citing *Guar. Trust Co.*, 304 U.S. at 132; *United States v. Hughes House Nursing Home, Inc.*, 710 F.2d 891, 895 (1st Cir. 1983); *N. Metal Co. v. United States*, 350 F.2d 833, 839 (3d Cir. 1965)). *See also Badaracco v. Commissioner*, 464 U.S. 386, 406 (1984) (Stevens, J., dissenting) (interpretation should be avoided which "would leave the statute open for that portion of eternity concurrent with [a prospective defendant's] life, whether he lives three score and ten or as long as Methuselah") (internal citation and quotation marks omitted), *cited in Core Labs.*, 759 F.2d at 483 n.2.

Like the Government's position rejected in *Core Laboratories*, the Second Circuit's addition of a discovery rule fundamentally frustrates the goal of repose underlying Section 2462. Under the discovery rule, the triggering event for the limitations period is when the relevant federal agency "discovers" a violation. The Government, however, frequently is responsible for the time of its "discovery." Because "the progress of [an investigation] is largely within the control of the Government," which "is exempt from the consequences of its laches," government agencies potentially have the ability to bring civil enforcement claims for fines, penalties, and forfeitures

into perpetuity. *Core Labs.*, 759 F.2d at 482-83. Accordingly, potential defendants would have no assurance that the Government's time for investigation and action has passed.[2]

As members of a heavily regulated industry, financial institutions frequently are targets of civil enforcement actions brought by federal agencies. For example, the Office of the Comptroller of the Currency ("OCC") reported 37 civil money penalties actions, resulting in $41,992,773 in penalties during the 2011 fiscal year. OCC, Annual Report 41 (Nov. 3, 2011), *available at* http://www.occ.gov/publications/publications-by-type/annual-reports/2011AnnualReport.pdf. Likewise, the Federal Deposit Insurance Corporation ("FDIC") reported 5,192 active restitution and forfeiture orders, $3,633,426 collected as a result of criminal restitutions and forfeitures, and 550 enforcement actions initiated in fiscal year 2011.[3]

---

[2] Allowing a federal agency to employ the discovery rule to obtain civil penalties—where it has not suffered any damages—is especially anomalous in the securities context considering the fact that private litigants, who in fact may have suffered damages, may *not* bring a cause of action more than five years following the conduct that allegedly caused them injury. *See, e.g.*, *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011) (holding that Section 1658(b), applicable to Section 10(b) private causes of action, is a statute of repose that extinguishes the right of action).

[3] The FDIC noted that the majority of these claims resulted from unfair or deceptive acts or practices committed by banks' third party vendors and "were the result of banks entering into new product markets through third-parties without maintaining sufficient oversight of vendors' activities." FDIC Report at 23.

FDIC, Annual Report 23, 38, 129 (Apr. 30, 2012), *available at* http://www.fdic.gov/about/strategic/report/2011annualreport/AR11final.pdf.[4]

The enormity of the risk to financial institutions becomes clearer when considering that Section 2462 governs a wide swath of government enforcement actions. At least eighty statutory provisions that provide for civil fines, penalties, or forfeiture do not contain or incorporate a different statute of limitations. At least fifteen of these statutory provisions, in ten different titles of the United States Code, apply directly to *amicus*'s members. *E.g.*, 2 U.S.C. § 1606(a) (failing to disclose lobbying activities); 7 U.S.C. §§ 9(10)(c) (manipulating commodities or swaps), 13a (same), 13a-1 (same); 12 U.S.C. §§ 1703(b)(7) (providing false information related to housing loan), 1735f-14(b)(F) (certifying false housing certificate), 1818(i) (Federal Deposit Insurance Act); 15 U.S.C. § 45(m)(1)(A) (engaging in unfair or deceptive acts or practices); 18 U.S.C. § 1034(a) (making false material statement to insurance regulator re-

---

[4] The Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, requires the FDIC, OCC, Federal Trade Commission ("FTC"), Federal Reserve Board, Consumer Finance Protection Bureau ("CFPB"), National Credit Union Administration, and the Department of Housing and Urban Development ("HUD") to refer certain discrimination matters to the U.S. Attorney General. *Id.* § 1691e(g). Between 2009 and 2011, the DOJ received 109 referrals from the CFPB, FTC, and HUD. *See* Attorney General, 2011 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 2, 11-12 (March 2012), *available at* http://www.justice.gov/crt/about/hce/documents/ecoareport2011.pdf.

garding land, property, or security); 19 U.S.C. § 1593a(c)(1) (inducing or attempting to induce payment or credit with material false statement); 20 U.S.C. § 1082(g) (misrepresenting education loan finance charge); 22 U.S.C. § 3105(a) (failing to provide information for International Investment and Trade in Services Survey); 31 U.S.C. § 5330(e) (failing to register money transmitting business); 38 U.S.C. § 3710(g)(4) (making false certification regarding mortgage provided to veteran). It is likely that *all* provisions governed by Section 2462 indirectly affect financial institutions because the provisions apply to their customers and financial institutions may be required to provide discovery if a customer is under investigation.

The tremendous litigation risks that banks and their affiliates face is exacerbated by the Second Circuit's ruling below. Should that opinion stand, potential defendants (institutions and individuals alike) will be unable to reasonably assess their newly-expanded litigation risks. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150 (1987) ("This uncertainty has real-world consequences . . . . 'Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.'") (quoting *Wilson*, 471 U.S. at 275).[5]

---

[5] This uncertainty ultimately increases transaction costs and may create reluctance to participate in the marketplace. *See* Note, *SEC Enforcement Suits*, 94 Mich. L. Rev. 512, 529 (1996) ("If SEC enforcement suits could impose staggering fines on corporate entities at any time, the transaction costs of contracting would increase as parties would have to compensate for this risk of liability."); James W. Beasely, Jr., *Report of the Task Force on Statute*

Recognizing the important repose function that Section 2462 plays, most courts have not adopted the position taken by Respondent and the Second Circuit. *See, e.g.*, *SEC v. Bartek*, No. 11-10594, 2012 WL 3205446, at *3 (5th Cir. Aug. 7, 2012) (per curiam) (alleged securities violations); *Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002) (per curiam) (alleged Energy and Policy Conservation Act violation); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (alleged Federal Election Campaign Act violation); *3M Co.*, 17 F.3d at 1457 (alleged EPA violations); *Core Labs.*, 759 F.2d at 483 (collecting prior authorities); *United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954) (alleged Surplus Property Act violations).

Because Section 2462 should not be given an interpretation that "conflicts with a basic objective—repose—that underlies limitations periods," *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997), and because "it would be utterly repugnant to the genius of our laws to allow such prosecutions a perpetuity of existence," *United States v. Mayo*, 1 Gall. 396, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15,755) (Story, J.), the Court should reject the Second Cir-

---

of Limitations for Implied Actions by the Committee on Federal Regulation of Securities, 41 Bus. Lawyer 645, 647 (1986) ("[M]anagements of publicly held companies, as well as their auditors and attorneys, are frequently unable to assess the impact of possible litigation . . . . This deprives investors of information adequate for informed evaluation of such companies' potential liabilities."); Mark T. Roche, Sean C. Adams & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, 44 Secs. Reg. & L. Rep. 1415, 1421 (July 23, 2012).

cuit's improper grafting of a "discovery" rule onto Section 2462.

II. The Ruling Below Undermines the Principle of Preventing the Difficulties of Stale Claims.

An additional, closely-related purpose for statutes of limitations is the desire to prevent the practical difficulties caused by old claims. This principle is important for at least two reasons.

First, the principle seeks to protect defendants from the specter of having to mount a defense without the benefit of viable evidence. As the Court explained in *Burnett*:

> Statutes of limitations are primarily designed to assure fairness to defendants . . . . by preventing . . . claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation . . . .

380 U.S. at 428; *see also Wilson*, 471 U.S. at 271 ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."); *Bell*, 26 U.S. at 360 ("[The statute of limitation] is a wise and beneficial law . . . to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses . . . to suppress those prejudices which may rise up at a dis-

tance of time, and baffle every honest effort to counteract or overcome them.").

Second, statutes of limitations also help ensure that court proceedings have just and credible outcomes based on the most accurate factfinding possible. *See Kubrick*, 444 U.S. at 117 ("[Limitations statutes] protect defendants *and the courts* from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence . . . .") (emphasis added). It would be exceedingly difficult for a court to find accurate facts where a defendant did not have notice of a potential claim and, hence, the opportunity to preserve the evidence necessary to put on a vigorous defense.

The Second Circuit's ruling interferes with this important function of Section 2462. If the discovery rule applies, defendants potentially will be forced to defend against claims that have been dormant for more than half a decade (and perhaps for more than a decade), unless the defendant is able to establish at summary judgment or trial that the Government could have discovered the alleged violation earlier. *See* Pet. App. at 21a-22a. As more time passes between the questioned conduct and the filing of an agency's cause of action, the more likely it will be that individuals involved in the relevant transactions or events no longer will be available to provide testimony necessary to the defense.

Additionally, documents related to the questioned conduct may not have been retained by the defendant or others. For example, financial institutions may retain relevant documents only for the time periods required by applicable statutes and regulations. The required retention periods often do not exceed five

years—the traditional time period provided for federal agencies to bring civil penalty claims under Section 2462. *See, e.g.*, 12 C.F.R. § 219.24 (requiring documentation for fund transfers and transmittals of funds to be retained for 5 years), 31 C.F.R. §§ 1010.306, -.420, -.430, -.630 (requiring documents identified in the Bank Secrecy Act to be retained for 5 years). *See generally* Robert F. Zielinski & Vito Petretti, *Records Retention: What Banks Don't Know Can and Likely Will Hurt*, 119 Banking L.J. 350, 352 (2002).

Moreover, in some instances, an agency's civil penalty claims could be based on conduct that the defendant did not suspect would be the subject of any government investigation or potentially result in a fine, penalty, or forfeiture. Thus, it is not unreasonable that a potential defendant (or a bank used by a potential defendant with relevant records) may have discarded or deleted documents related to dated transactions that a federal agency now suspects (or "discovers") to have given rise to a claim for a civil fine, penalty, or forfeiture. A rule that allows the Government to sleep on its rights only to bring a claim when a party's potential defense has been undermined creates the wrong incentives for federal agencies—as Congress recognized in enacting the generally applicable five-year statute of limitations. Such a rule should be rejected.

The concern about the difficulty caused by stale evidence embodied in statutes of limitations does not dissipate simply because a government agency brings a claim that allegedly "sounds in fraud" and is subject to Section 2462. If anything, a defendant's concerns about the inability to mount a defense are

more profound when facing such a government investigation because of the reputational harms that typically accompany such investigations. *See, e.g.*, Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. Rev. 1371, 1379 (2011) ("Adverse publicity—or simply the threat of it—often precedes or accompanies formal enforcement actions . . . . [C]apital markets and other audiences now process agency publicity swiftly and sometimes hastily . . . . Stock prices quickly reflect [this] new information."); Robinson B. Lacy, *Adverse Publicity and SEC Enforcement Procedure*, 46 Fordham L. Rev. 435, 440, 441 (1977) ("Sometimes the staff will decide not to recommend any action against the target, but the rumors and suspicions will persist. . . . The adverse publicity resulting from the institution of public enforcement proceedings may have as severe an impact on the respondent or defendant as any formal sanction ultimately imposed."); Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380, 1381 (1973) ("When the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous.").[6]

---

[6] This Court has held that, ordinarily, no judicial review or remedy is available to defendants for market harms caused by negative publicity due to a government investigation or the government's adverse statement about a defendant. *See, e.g.*, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (discussing company's complaint about negative publicity resulting from FTC investigation and concluding that "the expense and annoyance of litigation is 'part of the social burden of living

Indeed, under the Second Circuit's rule, defendants are doubly disadvantaged. They would have to rely on diminished evidence—if not deleted or destroyed—to prove both the underlying merits of the claim *and* the threshold issue of the Government's lack of due diligence. To the extent that the necessary evidence is no longer available to the defendant, a court entertaining civil penalty proceedings would be deprived of the data necessary to ensure the most accurate and credible factual determinations. Accordingly, the discovery rule undermines Section 2462's protections for defendants and courts.

III. The Ruling Below Undermines the Principle of Judicial Efficiency.

A related justification for statutes of limitations is judicial efficiency. As this Court stated in *Burnett*, "[t]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." 380 U.S. at 428; *see also John R. Sand & Gravel Co.*, 552 U.S. at 133 (identifying "judicial efficiency" as "a broader system-related goal" of statutes of limitations); *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (recognizing that statute of limitations "promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time") (citing *Day v. McDonough*, 547 U.S. 198, 205–06 (2006)); *Burnett v. Grattan*, 468 U.S. 42, 53 (1984) (recognizing that statutes of limitation employ "con-

---

under government'"); *see also* Cortez, 2011 BYU L. Rev. at 1423.

siderations of judicial or administrative economy"); *Cooey v. Strickland*, 479 F.3d 412, 419 (6th Cir. 2007) (observing that "statutes of limitations . . . are designed to 'promote judicial economy and protect defendants' rights'").

The Second Circuit's ruling will severely undermine the judicial efficiency benefits that Section 2462's bright line has traditionally supplied. The ruling below will spawn collateral litigation on at least two threshold issues. First, as Petitioners point out, courts (or juries in many instances) will be required to determine, on a case-by-case basis, whether the federal agency bringing a civil penalty claim knew or reasonably should have known about the conduct on which its case rests. *See* Pet. Br. at 44-46; *see also* Pet. App. at 21a-22a. Determining whether the Government was—or should have been—on notice regarding the underlying conduct likely will involve protracted discovery and tangled factual disputes. For instance, potentially relevant to notice and due diligence will be any other investigations that the agency has conducted related to similar alleged conduct, as well as the agency's investigative techniques, vigor, decisionmaking, and resource allocation. The Government likely will claim that much of this data is protected and should not be disclosed based on various privileges (*e.g.*, the law enforcement privilege, attorney-client privilege, work product doctrine, or deliberative process privilege). *See* Pet. Br. at 44-45. Second, courts will be bogged down with adjudicating whether the underlying claim is brought under a statute that "sounds in fraud." *Id.* As a result, "scarce resources must be dissipated by useless litigation on collateral matters," *Wilson*, 471 U.S. at 275—litigation concerned solely with the applicabil-

ity of the statute of limitations (not the merits), a determination that should be possible by considering the straightforward statutory language of Section 2462, rather than by extended litigation.

As with the other major policies underlying statutes of limitations, the Second Circuit's holding below threatens to radically reduce the sound benefits of reducing collateral litigation that Section 2462 has traditionally offered to litigants, courts, and society. Reversing the court below in favor of the bright line rule set forth in the statute "avoid[s] intolerable . . . 'and time-consuming litigation'" on collateral issues. *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 272).

* * *

In sum, the ruling below erroneously transforms Section 2462 by undercutting the principles foundational to statutes of limitations. Significant uncertainty and administrative burdens for citizens and regulated industries will follow from such a rule of law. Nearly two centuries ago, when faced with the question "whether the statute of limitations shall be restored to its original meaning, or be reduced . . . to a nullity," *Bell*, 26 U.S. at 354, this Court explained that "statute[s] of limitations [are] entitled to the same respect with other statutes, and ought not be explained away," *id.* at 361. Section 2462—and its straightforward statute of limitations—should be given full respect and effect, and a "discovery" rule should not be grafted onto the plain language of the statute.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

THOMAS PINDER
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

CLIFFORD M. SLOAN
Counsel of Record
JOSEPH L. BARLOON
ANAND S. RAMAN
RAY D. MCKENZIE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
cliff.sloan@skadden.com

November 16, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
NOV 16 2012
OFFICE OF THE CLERK

No. 11-1274

IN THE

Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* SUPPORTING PETITIONERS

JOHN F. SAVARESE
Counsel of Record
GEORGE T. CONWAY III
DAVID B. ANDERS
KEVIN S. SCHWARTZ
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000
JFSavarese@wlrk.com

Counsel for Amicus Curiae

November 16, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress

QUESTION PRESENTED

Whether, in an enforcement action in which the government seeks civil penalties on a claim that "sounds in fraud," the five-year period established by 28 U.S.C. § 2462 begins to run when the government can first bring the action, or when the government has discovered, or reasonably could have discovered, the alleged fraud.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE DISCOVERY RULE PROPOSED BY THE SEC IS UNWORKABLE AND UNWARRANTED	5
II. PRONOUNCEMENT OF A DISCOVERY RULE HERE WOULD VITIATE THE PURPOSE OF THE STATUTE	14
CONCLUSION	19
APPENDIX	
SEC Organization Chart	1a

TABLE OF AUTHORITIES

Page(s)

Cases

3M Co. v. *Browner*,
17 F.3d 1453 (D.C. Cir. 1994) ..... *passim*

Adams v. *Woods*,
6 U.S. (2 Cranch) 336 (1805) 5, 18

Bailey v. *Glover*,
88 U.S. (21 Wall.) 342 (1875) 4, 6

Burnett v. *N.Y. Central R. Co.*,
380 U.S. 424 (1965) 16

Campbell v. *City of Haverhill*,
155 U.S. 610 (1895) 18

Holmberg v. *Armbrecht*,
327 U.S. 392 (1946) 6

In re City of New York,
607 F.3d 923 (2d Cir. 2010) 15n

In re County of Erie,
473 F.3d 413 (2d Cir. 2007) 15n

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*,
501 U.S. 350 (1991) 5, 16

Merck & Co. v. *Reynolds*,
130 S. Ct. 1784 (2010) 6

NLRB v. *Sears, Roebuck & Co.*,
421 U.S. 132 (1975) 15n

Pendergast v. *United States*,
317 U.S. 412 (1943) 18

Railroad Telegraphers v. *Railway Express Agency*,
321 U.S. 342 (1944) 16, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Stearns v. *Page*,
48 U.S. (7 How.) 819 (1849) 6

Toussie v. *United States*,
397 U.S. 112 (1970) 17

TRW Inc. v. *Andrews*,
534 U.S. 19 (2001) 6

United States v. *Kubrick*,
444 U.S. 111 (1979) 16, 17

United States v. *Mayo*,
26 F. Cas. 1230 (C.C.D. Mass. 1813) 19

Wood v. *Carpenter*,
101 U.S. 135 (1879) 16, 17

Statutes and Rules

28 U.S.C. § 2462 ..... *passim*

Dodd-Frank Wall Street Reform and
Consumer Protection Act, Pub. L. 111-203,
124 Stat. 1376 (2010) 7

Securities Exchange Act of 1934,
15 U.S.C. § 78a *et seq.*:
15 U.S.C. § 78t-1 (§ 20A) 16n

Other Authorities

Khuzami, Robert, Dir., Div. of Enforcement,
U.S. Securities and Exchange Commission,
Remarks Before the N.Y. City Bar:
My First 100 Days as Director of Enforcement
(Aug. 5, 2009), available at
http://1.usa.gov/SjRdCE 17n

TABLE OF AUTHORITIES—Continued

Page(s)

Schapiro, Mary L., Chairman, U.S. Securities and Exchange Commission, *Testimony Before the Subcomm. on Fin. Servs. and Gen. Gov't Comm. on Appropriations, U.S. House of Representatives* (Mar. 6, 2012), available at http://1.usa.gov/RRAgmf 17n

U.S. Securities and Exchange Commission, FY 2011 Performance and Accountability Report, available at http://1.usa.gov/U5pJR7 ..... 8n, 9n

U.S. Securities and Exchange Commission, Office of Investigations, Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme (Aug. 31, 2009), available at http://1.usa.gov/VNfGq2 ..... 9n, 10n

U.S. Securities and Exchange Commission, Office of Investigations, Investigation of Fort Worth Regional Office's Conduct of the Stanford Investigation (June 19, 2009), available at http://1.usa.gov/QEqZj2 ..... 11n

U.S. Securities and Exchange Commission, Office of Investigations, Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme (Mar. 31, 2010), available at http: //1.usa.gov/UATTly 11n

IN THE

Supreme Court of the United States

No. 11-1274

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The Association of the Bar of the City of New York is a voluntary association of lawyers and law students. Founded in 1870, it is one of the oldest bar associations in the United States. Its purposes include "cultivating the science of jurisprudence, promoting reforms in the law, [and] facilitating and improving the administration of justice."

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made any monetary contribution to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

Today the City Bar has more than 23,000 members. It also has 150 standing and special committees that focus on particular legal practice areas and issues, and through which the City Bar comments on legal issues and public policy. This brief was prepared by the City Bar's Special Committee on White-Collar Crime, which addresses issues concerning the administration, application, and interpretation of criminal laws addressing white-collar crime.

Although this case does not involve a criminal prosecution, the "[f]ines, penalties, and forfeitures" that may be imposed in civil enforcement cases such as this one "may be considered a form of punishment." *3M Co.* v. *Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994). In addition, the type of regulatory enforcement proceeding that has given rise to the question at issue here frequently arises in tandem with criminal enforcement matters, and the correct determination of the lawful scope of such regulatory proceedings will have a direct bearing on those parallel criminal proceedings. Accordingly, the Special Committee in particular, and the City Bar as a whole, have a strong interest in the correct determination of the important question presented in this case—whether the general time limit for civil penalty actions brought by the government can in effect be extended indefinitely in cases involving allegations of fraud.

Certain members of the Special Committee, including all members employed by the Federal Government and its agencies, have recused themselves from any participation in the decision to submit, and the preparation of, this brief, and accordingly cannot be understood as joining in any position this brief may take.

SUMMARY OF ARGUMENT

The SEC's effort to impose a "discovery" rule on the applicable limitations period for fraud suits when it seeks civil penalties is both unsupportable and impractical. As the SEC would have this Court read 28 U.S.C. § 2462, "the limitations period in a suit for fraud does not begin to run until the [government] discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying [the government's] claim." SEC Br. in Opp. 7. Whether the statute bars an enforcement action would thus turn on what government employees knew or did not know, and upon whether they acted with reasonable diligence on what they knew.

How would the SEC's proposed standard work in practice? There are, at bottom, two alternatives. One is that application of the standard is taken seriously. Lower courts could thus allow extensive discovery and engage in exhaustive fact-finding, on what agency personnel knew, when they knew it, and how they acted on it. As we show below, this would be quite unlike how a discovery rule works in private civil cases, or when the government is suing as a defrauded transactor as opposed to a law enforcer; in those cases, there will typically be a single decisionmaker whose knowledge and actions matter, law enforcement prerogatives will not be implicated, and the focus of judicial review is correspondingly narrow and disciplined. Examining the knowledge and activities of a sprawling and multifaceted agency like the SEC, by contrast, would raise factual questions far more complex—as we illustrate below with cautionary examples, the efforts to understand what SEC

lawyers first knew or could have known during the Madoff and Stanford investigations. Employing a discovery rule in the context of enforcement actions would greatly burden the lower courts, and would drag them into a quagmire of questions "more appropriate for a congressional oversight hearing" than a court of law. *3M*, 17 F.3d at 1461.

The other alternative is that trial judges could seek to extricate themselves from that quagmire by so curtailing the scope of factual inquiry that the discovery standard would become virtually impossible to meet. Courts could interpret the standard strictly, uphold agency privilege claims broadly, and limit pretrial discovery (as in document productions and depositions) inflexibly. If they do that, Section 2462's five-year rule would be gutted.

Neither alternative can be squared with the law. As for the first alternative, it is difficult to "understand why Congress would have wanted the running of § 2462's limitations period to depend on such considerations" as "the degree of difficulty an agency experiences in detecting violations." *3M*, 17 F.3d at 1461. Certainly nothing about the historic "background principle" upon which the SEC relies—the "discovery rule," SEC Br. in Opp. 12—requires it. That rule served to help *victims* of fraud in tort lawsuits, not the government in its capacity as the enforcer of laws. Again and again, this Court has made clear that the discovery rule applies in favor of "*the party injured by the fraud*," *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348 (1875) (emphasis added). The rule has no place in the radically different circumstance in which the government is suing as law enforcer.

And the second alternative, where the rule is essentially made impossible for defendants to meet, is utterly unsupportable as well. The five-year period specified in Section 2462 was clearly intended to "serve as a cutoff," *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991), and to construe it otherwise would repudiate the salutary purposes this Court long has recognized underlie statutes of limitation and repose. "[I]t could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture," *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.), but that is the result the SEC asks this Court to bless here.

ARGUMENT

I. THE DISCOVERY RULE PROPOSED BY THE SEC IS UNWORKABLE AND UNWARRANTED.

1. The "discovery rule" invoked by the SEC has no application to cases in which the government, as law enforcer, is the plaintiff. The "background principle" upon which the SEC relies, SEC Br. in Opp. 12, implicates a narrow inquiry which courts long have administered: whether a plaintiff—the party to the particular transaction at issue—knew or could have known that he or she was being defrauded. By contrast, the discovery rule historically has never been applied by courts—and would be completely unworkable—in the context of a government enforcement action in which Congress did not require proof of fraud, damages, or any injury at all to the plaintiff.

The discovery rule thus served to help persons to sue for fraud who were *themselves victims* of an

alleged fraud. This Court explained the point in the nineteenth century: "the bar of the statute does not commence to run until the fraud is discovered or becomes known *to the party injured by it*"; it applied "where *the party injured by the fraud* remains in ignorance of it," and turned upon "the knowledge of *the other party*" to an allegedly fraudulent transaction. *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 347, 348 (1875) (emphasis added). Even well before *Bailey*, the Court said that "if a party has perpetrated a fraud which has not been discovered till the statutable bar may apply to it in law, courts of equity will interpose and remove the bar out of the way of *the injured party*." *Stearns* v. *Page*, 48 U.S. (7 How.) 819, 829 (1849) (emphasis added).

And this Court has repeated the point in its more modern cases. "[T]he old chancery rule" described in *Bailey*, the Court has since explained, governs "where *a plaintiff has been injured by fraud*." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (emphasis added), *quoted in TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001). "This Court long ago recognized that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent *a plaintiff* from even knowing that *he or she has been defrauded*." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010) (emphasis added and omitted).

Limiting the discovery rule to the traditional situation addressed in the case law, where plaintiffs were *themselves victims* of an alleged fraud, makes perfect sense. The relevant inquiry in such cases is narrow and discrete: what did the plaintiff know, and when, about a transaction or contract to which the plaintiff *itself* was a party? Even when the government is bringing suit as a victim of fraud, the inquiry is much

the same: the question becomes what did the responsible official know, and when, about the transaction or contract she was handling on behalf of the government?

By contrast, if a discovery rule were applied to a government *enforcement* action for a claim that "sounds in fraud," Pet. App. 18a, the "discovery" inquiry—apart from not being grounded in any judicial experience—would become many times more complex, and virtually impossible for courts to administer. Information about a particular alleged fraud may not be limited to a particular individual, or a particular office location, or even a particular division, of a government agency. And to apply a discovery rule in favor of a government agency would require courts to answer questions about how the agency, as a whole and through its various interacting parts, should properly operate. "An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others." *3M Co.* v. *Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

2. The multidimensional work of the independent agency involved here, the SEC, illustrates these points. Charged by Congress to address an array of important and challenging problems, *see, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), the SEC organizes its activities into multiple

divisions with particular areas of expertise that frequently overlap and intersect. This is reflected in the SEC's current organizational chart, reprinted in the appendix to this brief.[2] Broker-dealers, investment advisers, securities issuers, and others subject to SEC regulation regularly interact with various offices and divisions reflected on that chart.

If a company issues securities, it will make filings that are reviewed by the SEC's Division of Corporation Finance.[3] If it is a broker-dealer, it will be overseen by the Division of Trading and Markets.[4] If it is an investment company or investment adviser, it will be regulated by the Division of Investment Management.[5] If it is a registered entity of any sort (say, a broker-dealer, transfer agent, investment company or adviser, national securities exchange, among others), it will be subjected to regular examinations and inspections conducted by the Office of Compliance Inspections and Examinations, which has personnel at each of the SEC's 11 regional offices.[6]

And if a company or individual is ever investigated for possible violations of the federal securities laws, yet another arm of the agency, the Division of

---

[2] The chart comes from the SEC's annual report for 2011. U.S. Securities and Exchange Commission, FY 2011 Performance and Accountability Report at 9 ("SEC 2011 Annual Report"), which may be found at http://1.usa.gov/U5pJR7.

[3] *See* "About the Division of Corporate Finance," http://1.usa.gov/WsixpJ.

[4] *See* "About the Division of Trading and Markets," http://1.usa.gov/SPxoHn.

[5] *See* "Division of Investment Management," http://1.usa.gov/RC1xZT.

[6] *See* "National Exam Program," http://1.usa.gov/SuYyjC; *see also* Appendix at 1a.

Enforcement, will conduct the investigation.[7] That division consists of personnel in various branches at the SEC's headquarters in Washington, as well as personnel at each of the 11 regional offices. Indeed, as a matter of internal practice, when the Enforcement Division commences a complex inquiry, it frequently consults with other divisions that may have relevant expertise.

Figuring out who knew what, and when, in such a large, multifaceted organization, with intersecting responsibilities and expertise across its nearly 4,000 employees and with an annual budget of nearly $1.7 billion[8]—and to do so for a period of many years—would be a daunting task, to say the least. Consider, for example, the many interactions that the SEC had with Bernard L. Madoff Investment Securities in the 16 years preceding the revelation of Madoff's Ponzi scheme, as recounted in a report of the SEC's Inspector General.[9] That fraud did not involve any limitations question, as it continued until the day it collapsed in 2008. Yet the work involved in the investigation and analysis that led to the Inspector General's Madoff report—which, at bottom, was an effort to determine who knew what, and when, within the SEC—illustrates the unworkability of the rule proposed by the SEC.

The SEC Inspector General's report reflects an examination of events that, over almost two decades,

---

[7] *See* "About the Division of Enforcement," http://1.usa.gov/U5mRns.

[8] *See* SEC 2011 Annual Report at 9.

[9] U.S. Securities and Exchange Commission, Office of Investigations, Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme (Aug. 31, 2009), available at http://1.usa.gov/VNfGq2.

implicated in distinct ways work by the agency's different divisions and offices. The Inspector General examined actions by the SEC Enforcement Division's staff in the New York office in response to an external complaint in 1992; in the Boston office in response to an external complaint in 2000; in the Boston and New York offices in response to an external complaint in 2001; and in the Boston and New York offices in response to an external complaint in 2005. The Inspector General also reviewed actions of the SEC's Office of Compliance Inspections and Examinations staff, both in the Washington, D.C. office on the basis of an external complaint received in 2003 and in the New York office on the basis of e-mails reviewed in a separate examination around the same time.[10]

The SEC Inspector General issued a 457-page report based upon his year-long review of a massive evidentiary record. This record included 140 depositions and interviews of 122 individuals; testimony given in a 2009 congressional hearing; and staff e-mails and other documents from the SEC Office of Compliance Inspections and Examinations, the SEC Headquarters, the SEC New York and Boston offices, the Department of Justice, and a variety of independent third-parties.[11]

Similarly illustrative are the SEC Inspector General's reports on Robert Allen Stanford's Ponzi scheme that, over more than a decade, also implicated the SEC's different divisions and offices. After issuing a June 2009 report concerning the SEC Fort Worth

---

[10] *See id.* at 21-41.

[11] *See id.* at 3-20.

Regional Office's investigation of Stanford,[12] the Inspector General conducted a further investigation and issued another report in response to a request from certain Members of Congress for "a more comprehensive and complete investigation of the handling of the investigation into" Stanford.[13] The Inspector General's 151-page report, issued in March 2010, was based on an evidentiary record that included 51 depositions and 48 interviews with current and former members of the examination and enforcement staff of the SEC Fort Worth Regional Office; and staff e-mails and other documents from the Fort Worth office, the SEC Headquarters Office of Compliance Inspections and Examinations, the SEC Headquarters Division of Trading and Markets, the SEC Headquarters Division of Enforcement, the SEC Headquarters Ethics office, the SEC Office of Economic Analysis, the Financial Industry Regulatory Authority, and various independent third-parties.[14]

3. The SEC Inspector General's reports illustrate how the task of determining when "the Commission discovered, or reasonably could have discovered," "the relevant facts," SEC Br. in Opp. 7, 9, may necessarily involve agency personnel in more than one division, and more than one office, of the agency. And it

---

[12] U.S. Securities and Exchange Commission, Office of Investigations, Investigation of Fort Worth Regional Office's Conduct of the Stanford Investigation (June 19, 2009), available at http://1.usa.gov/QEqZj2.

[13] U.S. Securities and Exchange Commission, Office of Investigations, Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme at 1-2 (Mar. 31, 2010), available at http://1.usa.gov/UATTly.

[14] *See id.* at 1-9, 16-28.

illustrates the sorts of issues that, in situations involving allegations of noncontinuing and less egregious frauds, district judges—not to mention juries—would find themselves embroiled in if the SEC's proposed discovery rule is accepted.

For example: Which branches, groups, offices, and divisions had knowledge of relevant facts, whether obtained from a tipster, or from a complainant, or from the press, or from an investigation or examination of the defendant, or from an investigation or examination of someone else? Did staffers "exercise ... reasonable diligence" in following up on what they learned? SEC Br. in Opp. 7. If investigators or examiners failed to follow up because, for want of adequate technical knowledge, training, or experience, they failed to understand the information they possessed, does that amount to lack of "reasonable diligence"?

If agency supervisors fail to assign examinations or investigations to sufficiently knowledgeable, trained, and experienced staffers, is that lack of reasonable diligence? What if one group of examiners and investigators fails to coordinate with another group within the agency? Or what if the examiners or investigators fail to follow up because they are told to put a matter on the back burner, or to drop it altogether, and to devote their attention to something else? Does that count as lack of reasonable diligence? Finally, if reasonable diligence is lacking, there comes next an equally difficult—and inherently speculative—factual inquiry: whether, if "reasonable diligence" had been exercised by government employees, "could [they] have discovered[] the facts underlying [the government's] claim"? *Id.*

A discovery rule would thus require courts to decide how well an agency's various personnel, offices, and divisions individually and collectively did their job. That will be hard enough for a district judge to determine, but in cases in which the relief sought is legal, one or the other party may insist the relevant factual questions be resolved by jurors, who will be even more at sea. Either way, triers of fact will be forced to decide whether government employees did their jobs competently in investigating matters, staffing them, and coordinating them among themselves. And either way, whether they are preparing or reviewing findings of fact or jury instructions, lower courts will be forced to flesh out the SEC's proposed discovery standard by developing a body of law that sets standards for the conduct of government employees doing their jobs. As a result, this Court should "seriously doubt that conducting ... judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations." *3M*, 17 F.3d at 1461.

And the burden that a discovery rule would place on the courts, government agencies, and private parties would be immense. Securities litigation generally, and securities enforcement cases in particular, rank among the most complex types of matters faced by the lower federal courts today. Creating a limitations standard in enforcement cases that turns on the knowledge and diligence of government investigators and examiners would only add to the difficulty of those cases. It would not only add complexity to the merits, but would also foster knotty and protracted disputes over the production of documents and other evidence by agencies

before trial. It would place federal courts in the uncomfortable position, moreover, of second-guessing the competence, industriousness, and priorities of executive and independent agencies—a task "more appropriate for a congressional oversight hearing" or an agency inspector general than an Article III judge. *3M*, 17 F.3d at 1461. To say the least, it is difficult to "understand why Congress would have wanted the running of § 2462's limitations period to depend on such considerations." *Id.*

* * *

In short, superimposing a discovery rule on Section 2462 in cases brought by the government *as law enforcer* would drag agencies, defendants, judges, and juries into a morass—a morass that could not possibly have been contemplated by the chancellors who first developed that rule solely to benefit actual *victims* of fraud.

II. PRONOUNCEMENT OF A DISCOVERY RULE HERE WOULD VITIATE THE PURPOSE OF THE STATUTE.

One way out of the morass would be to construe and to apply a discovery rule under Section 2462 very strictly against defendants. This would be easy for district judges to do. The Second Circuit has already made clear that that it is the "*defendants* [who must] me[e]t *their* burden of demonstrating" the SEC's knowledge or "that [the SEC] would have discovered th[e] fraud" had it been "reasonably diligent." Pet. App. 22a (emphasis added). As for the agency's knowledge, this placement of burden will require defendants to develop and prove facts that, in most cases, will be uniquely within the *agency's*

possession. And as for the issue of reasonable diligence, defendants will find themselves in the unenviable position of establishing a hypothetical and counterfactual state of affairs: what *would* have happened *if* the government had acted differently, with the diligence deemed appropriate by the court.

These burdens on defendants will be difficult enough. But some judges will apply the standard more strictly than others. And surely any agency will vigorously resist efforts by defendants to get the evidence they need to meet their burden under the discovery rule. There will no doubt be assertions of privilege—law enforcement privilege, attorney-client privilege, deliberative process privilege.[15] And even apart from determining the scope of privileges, trial judges of course will have considerable discretion to limit the extent of evidence-gathering using their authority under the Federal Rules of Civil Procedure. So if a discovery rule were engrafted upon Section 2462, lower courts could, and some certainly *will*, make it virtually impossible to show that the statute has begun to run.

And that would utterly vitiate the obvious purpose of Section 2462. To begin with, Section 2462 was clearly meant to be a firm period of repose. Its plain language provides a simple and clear outside time limit, subject only to a single qualification: "Except as otherwise provided by Act of Congress."

---

[15] *See, e.g.*, *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (law enforcement privilege); *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (attorney-client privilege); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (deliberative process privilege).

28 U.S.C. § 2462. That time limit—five years—is a relatively generous one, also suggesting a period of repose. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991), this Court construed the shorter three-year time limits contained in various provisions of the 1933 and 1934 Acts as "period[s] of repose inconsistent with tolling." The Court also described a five-year limit established in another section of the 1934 Act—a provision that, like Section 2462, succinctly consists of a time limit with no exceptions—as a "statute of repose." *Id.* at 355.[16] It would be utterly incongruous to conclude that Section 2462 does not similarly "serve as a cutoff." *Id.* at 363.

To treat Section 2462 as anything but the clear cutoff Congress meant it to be, moreover, would undermine the important purposes underlying limitations periods generally. As this Court has well explained, statutes of limitations "assure fairness to defendants." *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, 428 (1965). They "promote repose by giving security and stability to human affairs," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), and "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). And they free courts from "having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disap-

---

[16] *See* 15 U.S.C. § 78t-1(b)(4) ("No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.").

pearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

There is a flip-side purpose as well. Another "important public policy" "at the[] foundation" of statutes of limitation is that "[t]hey stimulate to activity and punish negligence." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). They improve efficiency by "encouraging law enforcement officials promptly to investigate suspected [illegal] activity." *Toussie* v. *United States*, 397 U.S. 112, 115 (1970).

Indeed, the respondent agency here has itself emphasized the importance of promptly investigating violations of the federal securities laws. In the words of its current Director of Enforcement, a foundational principle of the SEC's enforcement regime is "to be as *swift* as possible."[17] This "sense of urgency is critical. *Long gaps between conduct and atonement undermine the deterrent impact of our cases*, and result in missed opportunities to achieve a permanent change in behavior and culture." *Id.* (emphasis added). In the same spirit, the SEC's Chairman recently told Congress that the agency would "[i]ncreas[e] the resources dedicated to the enforcement program" in order to "help improve our ability to ... act quickly to halt misconduct ... and maximize the deterrent impact of our efforts."[18]

---

[17] Robert Khuzami, Dir., Div. of Enforcement, U.S. Securities and Exchange Commission, *Remarks Before the N.Y. City Bar: My First 100 Days as Director of Enforcement* (Aug. 5, 2009), available at http://1.usa.gov/SjRdCE.

[18] Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission, *Testimony Before the Subcomm. On Fin. Servs. and Gen. Gov't Comm. on Appropriations, U.S. House of Representatives* (Mar. 6, 2012), available at http://1.usa.gov/RRAgmf.

Finally, undermining Section 2462 and its salutary purposes would directly contravene a rule for construing statutes of limitation that this Court has recognized since nearly the Republic's founding: the rule against perpetual liability. In an opinion written by Chief Justice Marshall more than two centuries ago, this Court examined the applicability of a statute of limitations concerned with "punish[ments]" to the government's claim for a civil penalty. In "expounding this law" to find the statute of limitations applicable, Chief Justice Marshall emphatically warned against allowing actions to be commenced "at any distance of time," for such endless liability "would be utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). As the Chief Justice declared:

> In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain *forever liable* to a pecuniary forfeiture.

Id. (emphasis added).

Time and again, this Court has invoked this venerable admonition in construing statutes of limitations. It is thus "a *cardinal principle*" that statutes of limitations "are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired." *Campbell* v. *Haverhill*, 155 U.S. 610, 616-17 (1895) (emphasis added); *see also Pendergast* v. *United States*, 317 U.S. 412, 418 (1943) (quoting *Adams* v. *Woods*).

* * *

Here as well, "it would be utterly repugnant to the genius of our laws[] to allow" penalty claims "a perpetuity of existence." *United States* v. *Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (Story, J.). And Congress did not intend such perpetuity here. Congress has pronounced its balanced judgment about when "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railway Express Agency*, 321 U.S. at 349. That judgment is five years, period—as set forth in the unambiguous and unqualified text of Section 2462.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

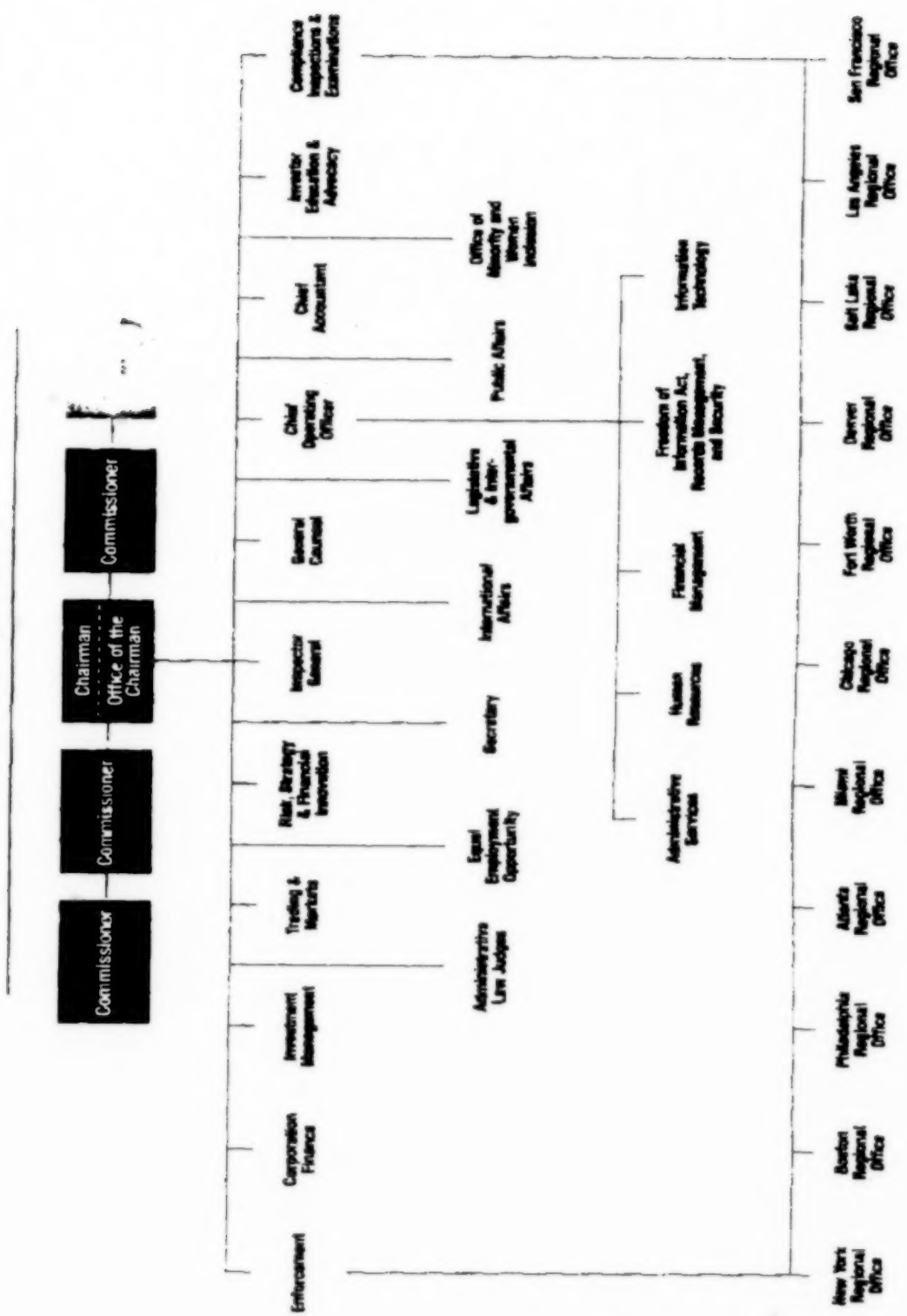
JOHN F. SAVARESE
Counsel of Record
GEORGE T. CONWAY III
DAVID B. ANDERS
KEVIN S. SCHWARTZ
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000
JFSavarese@wlrk.com

Counsel for Amicus Curiae

November 16, 2012

APPENDIX

APPENDIX


SEC ORGANIZATION CHART
Commissioner
Commissioner
Chairman
Office of the Chairman
Commissioner
Enforcement
Corporation Finance
Investment Management
Trading & Markets
Risk, Strategy & Financial Innovation
Equal Employment Opportunity
Administrative Law Judges
Inspector General
General Counsel
Chief Operating Officer
Chief Accountant
Investor Education & Advocacy
Compliance Inspections & Examinations
Secretary
International Affairs
Legislative & Intergovernmental Affairs
Public Affairs
Office of Minority and Women Inclusion
Human Resources
Financial Management
Freedom of Information Act, Records Management, and Security
Information Technology
Administrative Services
New York Regional Office
Boston Regional Office
Philadelphia Regional Office
Atlanta Regional Office
Miami Regional Office
Chicago Regional Office
Fort Worth Regional Office
Denver Regional Office
Salt Lake Regional Office
Los Angeles Regional Office
San Francisco Regional Office

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 16 2012
OFFICE OF THE CLERK

No. 11-1274

IN THE

Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
DAVID SCOTT
CATO INSTITUTE
1000 Massachusetts Ave. NW
Washington D.C. 20001
(202) 842-0200
ishapiro@cato.org
dscott@cato.org

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Dr.
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

WARREN D. POSTMAN
JONES DAY
51 Louisiana Ave. NW
Washington, D.C. 20001

November 16, 2012

Counsel for Amicus Curiae

QUESTION PRESENTED

Section 2462 of Title 28 of the U.S. Code provides that, "[e]xcept as otherwise provided by Act of Congress," *any* action for civil penalties brought by the U.S. Government must be "commenced within five years from the date when the claims first *accrued*." (emphasis added). This Court has explained that "a right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954).

Where Congress has not enacted a separate controlling provision, does a claim by the government for civil penalties first accrue for purposes of applying 28 U.S.C. § 2462's five-year limitations period when the government can first bring such an action?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. WHEN THE OPERATIVE LANGUAGE OF 28 U.S.C. § 2462 WAS ENACTED, A CLAIM "ACCRUED" WHEN EACH ELEMENT HAD COME INTO EXISTENCE. 6

II. THE GOVERNMENT'S ATTEMPT TO READ AN EXCEPTION INTO THE ESTABLISHED DEFINITION OF ACCRUAL UNDER § 2462 IS INCONSISTENT WITH SEPARATION OF POWERS. 10

III. EVEN IF COURTS WERE FREE TO ALTER THE MEANING OF "ACCRUE" IN § 2462, THERE WOULD BE NO BASIS TO CREATE A DISCOVERY RULE FOR GOVERNMENT FRAUD ACTIONS. 15

A. The Core Rationale For Applying A Discovery Rule In Private Fraud Actions Does Not Apply To Government Enforcement Actions. 16

TABLE OF CONTENTS
(continued)

Page

B. The Government's Approach Would Undermine The Central Purpose Of § 2462 By Creating An Indefinite Threat Of Government Enforcement Actions. 18

C. Any Ambiguity Should Be Resolved In Favor Of Lenity As Penal Laws Must Be Narrowly Construed. 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) ..... *passim*

Abuelhawa v. United States,
556 U.S. 816 (2009) 11

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 19

Bailey v. Glover,
88 U.S. (21 Wall) 342 (1875) 10, 12

Banister v. Solomon,
126 F.2d 740 (2d Cir. 1942) (Hand, J.) 14

Bank of the U.S. v. Daniel,
37 U.S. (12 Pet.) 32 (1838) 7

Commissioner v. Acker,
361 U.S. 87 (1959) 21

D. Ginsberg & Sons, Inc. v. Popkin,
285 U.S. 204 (1932) 14

Duncan v. Walker,
533 U.S. 167 (2001) 9

Evans v. Gee,
36 U.S. (11 Pet.) 80 (1837) 7

Exploration Co. v. United States,
247 U.S. 435 (1918) 10, 12

FEC v. Williams,
104 F.3d 237 (9th Cir. 1996) 15

Federal Communications Comm'n v. American Broadcasting Co.,
347 U.S. 284 (1954) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Girouard v. United States,
328 U.S. 61 (1946) 12

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 10, 12

INS v. Chadha,
462 U.S. 919 (1983) 11

Keppel v. Tiffin Savings Bank,
197 U. S. 356 (1905) 21, 22

Meredith v. United States,
38 U.S. (13 Pet.) 486 (1839) 7

Order of R.R. Telegraphers v. Ry. Express Agency, Inc.,
321 U.S. 342 (1944) 18

Rapanos v. United States,
547 U.S. 715 (2006) 12

SEC v. Jerry T. O'Brien, Inc.,
467 U.S. 735 (1984) 16

Skilling v. United States,
130 S. Ct. 2896 (2010) 20

Smith v. United States,
143 F.2d 228 (9th Cir. 1944) 15

Tiffany v. National Bank of Missouri,
85 U.S. (18 Wall.) 409 (1873) 21

Trawinski v. United Technologies,
313 F.3d 1295 (11th Cir. 2002) (per curiam) 17

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 9, 16

United States v. Core Labs., Inc.,
759 F.2d 480 (5th Cir. 1985) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Johnson,
529 U.S. 53 (2000) 14

United States v. Kubrick,
444 U.S. 111 (1979) 18

United States v. Lindsay,
346 U.S. 568 (1954) 7

United States v. Maillard,
26 F. Cas. 1140 (S.D.N.Y. 1871) 15

United States v. Ward,
448 U.S. 242 (1980) 19

United States v. Witherspoon,
211 F.2d 858 (6th Cir. 1954) 15

Wilcox v. Plummer,
29 U.S. (4 Pet.) 172 (1830) 3, 6, 7, 8

Williams v. Taylor,
529 U.S. 362 (2000) 11

Zuber v. Allen,
396 U.S. 168 (1969) 12

STATUTES

15 U.S.C. § 80b–9(e) 16

28 U.S.C. § 791 (1911) 6

28 U.S.C. § 1658 8

28 U.S.C. § 2462 ..... *passim*

42 U.S.C. § 3614 17

42 U.S.C. § 7413 17

Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 321 6

False Claims Act,
31 U.S.C. § 3731 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Federal Trade Commission Act, 15 U.S.C. § 1679i 9

Rev. Stat. § 1047, 18 Stat. 193 (1874) 6

OTHER AUTHORITIES

Clyde Wayne Crews, *Ten Thousand Commandments 2012: An Annual Snapshot of the Federal Regulatory State*, *available at* http://cei.org/sites/default/files/Wayne Crews - 10,000 Commandments 2012_0.pdf 19

The Federalist No. 78 (Alexander Hamilton) 11

H.R. Rep. No. 308, 80th Cong., 1st Sess. A191 (1947) 13

Mark Roche, Sean Adams, and Scott Frewing, *Will the SEC Have Forever to Pursue Securities Violations? SEC v. Gabelli*, 44 SRLR 1415 (2012) 20

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs. This case concerns Cato because the government's position that courts should recognize and exception to the traditional definition of when a claim accrues implicates constitutional principles of separation of powers and risks an expansion of federal enforcement power at the expense of individual liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

The SEC alleges that Gabelli Funds, LLC, a mutual fund managed by Petitioners, defrauded investors in violation of the Investor Advisers Act of 1940 by failing to disclose that it was allowing a favored investor to engage in "market timing"—*i.e.*, "buying and selling mutual fund shares in a manner

---

[1] No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this briefs preparation or submission. Counsel of record for both petitioner and respondents received timely notice of *amicus*'s intent to file the brief, and consented to it.

designed to exploit short-term pricing inefficiencies"—and that Petitioners aided and abetted this violation. Pet. App. 3a. "Although market timing is not itself illegal," the SEC's theory is that the market timing here "unfairly favored" one investor in a manner that should have been disclosed to other investors in the fund. *Id.* 5a, 7a.

Taking this theory at face value, every element necessary for the SEC to bring its claims existed as soon as Petitioners allowed, but did not disclose, the market timing at issue, from 1999 to August 2002. U.S. Opp. 5. The SEC did not file its claim for civil penalties until April 2008. Pet. App. 9a.

Because the Investor Advisers Act does not contain a specific statute of limitations for government enforcement actions, the SEC's suit is subject to 28 U.S.C. § 2462. That provision states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

When the operative language of § 2462 was adopted in 1839, it was well-established that a "claim first accrued" as soon as the elements necessary for suit came into existence, not when those elements were actually discovered by a claimant. *See Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172, 181 (1830). Thus, the

SEC's claims in this case accrued from 1999 to late 2002, and were time-barred when the SEC brought them more than five years later in 2008.

The Second Circuit, however, concluded that the SEC's claims were not time-barred. To so conclude, the court read into § 2462 an exception to the traditional and well-established definition of "accrue," under which a government claim that "sounds in fraud" does not accrue until the government discovers the existence of the elements of the claim. Pet. App. 18a Such a discovery rule, however, finds no basis in the statutory text and was not established in case law predating § 2462. Instead, both the Second Circuit and the government rely on supposedly favorable authority that *postdates* the key language of § 2462. This extrapolation from post-enactment case law involving private claims reflects a flawed method of statutory interpretation that undermines core principles of separation powers—and, even if taken on its own terms, ignores key distinctions between government enforcement actions and ordinary civil suits.

The Second Circuit effectively treated the text of § 2462 as an empty vessel into which it could pour new and evolving notions of when particular types of claims "accrue." Such a common law approach has no place in the interpretation of a federal statute, where meaning is fixed by legislative enactment rather than judicial mood. Where Congress employs a term of art that has been given a well-established meaning by case law, it is presumed to have adopted and codified that prior definition. That definition must be given effect by courts unless and until it is legislatively changed. Judicial changes to that definition after the

fact usurp the role of the legislature and impermissibly arrogate it to the courts.

Nor is there any basis to assume Congress's failure to respond to later changes in the judicial interpretation of a term was an implicit endorsement of that evolution. Congressional inaction is simply that: inaction. That is particularly true where, as here, later judicial decisions arise in a materially different context, and the statutory history makes clear that Congress had no intention to incorporate them.

Finally, to the extent there is any ambiguity regarding the definition of "accrued" under § 2462, numerous factors counsel against the government's interpretation here.

First, the central rationale for applying a discovery rule in fraud actions by private plaintiffs does not apply to actions for civil penalties brought by the government. The law recognizes that, although private parties will generally be directly impacted by, and hence aware of, most injuries that give them a legal claim, those harmed by fraudulent statements or omissions are less likely to be immediately aware of the accrual of their claim. Moreover, private individuals cannot reasonably be expected to affirmatively police all wrongdoing of which they are unaware. Thus, in contrast to other types of claims, fraud claims are unusually difficult for a private party to bring immediately upon accrual. For that reason, statutes of limitations for private fraud claims are often subject to a discovery rule, permitting a party to bring claims within a fixed period after discovering certain elements of the claim.

Government enforcement actions, on the other hand, by their very nature reflect the active role taken by the state in searching out and policing regulatory requirements, including fraud. The government, moreover, has considerable investigatory resources that it uses to identify wrongdoing, and, rather than suing as a victim, it may bring an enforcement action without awaiting any injury. Like enforcement of the criminal law, policing civil violations does present certain challenges; violators rarely self-report everything they may consider wrongdoing, especially where, as here, the government's theory is novel. But there is nothing about fraud-related activities that makes them inherently less susceptible to government enforcement than any other civil violation, such as the improper discharge of pollutants or discrimination in housing—all of which are subject to § 2462's limitations period of five years after accrual.

Second, reading a discovery exception into § 2462 would create an indefinite threat of potential government enforcement action, which would undermine the core purpose of the provision and impose far greater chill and unfairness on innocent parties than the mere threat of private liability. This effect would be particularly significant given the increasing breadth and uncertainty of federal regulation.

Finally, any ambiguity in the scope of § 2462 should be resolved in favor of lenity in light of the long-established rule that penal statutes are to be strictly construed.

ARGUMENT

I. WHEN THE OPERATIVE LANGUAGE OF 28 U.S.C. § 2462 WAS ENACTED, A CLAIM "ACCRUED" WHEN EACH ELEMENT HAD COME INTO EXISTENCE.

The operative language of § 2462 first appeared in an 1839 version of the statute, which provided that a government suit for a penalty had to be "commenced within five years from the time when the penalty or forfeiture accrued." Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 321, 322. Congress carried over this language into the 1874 version (Rev. Stat. § 1047, 18 Stat. 193, 193 (1874), later codified at 28 U.S.C. § 791 (1911)), and modified it only slightly in the 1948 revision to read, as it does today, "unless commenced within five years from the date when the claim first accrued," (28 U.S.C. § 2462). *See also 3M Co. v. Browner*, 17 F.3d 1453, 1458 & n.7, 1462 (D.C. Cir. 1994) (tracing in detail various versions of the statute).

When determining the meaning of a statutory term, the meaning sought ought to be the meaning of the term at the time of the statute's enactment. Congress cannot intend a term to have a meaning with which it is unfamiliar. "In 1839, when Congress used the word 'accrued,' it could not possibly have intended the word to incorporate any discovery of violation rule [because o]nly nine years earlier, the Supreme Court had rejected a discovery rule and held that a claim accrues at the moment a violation occurs." *Id.* at 1462. Specifically, in *Wilcox*, 29 U.S. (4 Pet.) 172, the Court explained that "[t]he cases are numerous and conclusive" that, unless a party pleads that his discovery of the claim was "suppressed by fraud," "the statute [is] held to run from the time of

the injury, that being the cause of action, and not from the time of damage or discovery of the injury." *Id.* at 181-82.

Nor was *Wilcox* an innovation. Numerous other cases, both before and shortly after 1839, "consistently used the phrase 'claim accrued' to mean the time at which a cause of action first existed, not the time when the violation was first discovered." *3M*, 17 F.3d at 1462 (collecting cases); *see also United States v. Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence."); *Meredith v. United States*, 38 U.S. (13 Pet.) 486, 493-94 (1839) (duties accrue to government when goods arrive at their port of entry, not when government learns they have arrived); *Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838) ("cause of action to recover the money, (had it been well founded) accrued at the time the mistaken payment was made"); *Evans v. Gee*, 36 U.S. (11 Pet.) 80, 84 (1837) ("A refusal to accept [a good in exchange for payment] is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee.").

To be sure, *Wilcox* suggests that a cause of action will not be barred despite the expiration of a limitations period where a plaintiff's knowledge of the claim was "suppressed by fraud." *Wilcox*, 29 U.S. at 182. As the Second Circuit itself recognized, however, this "fraudulent concealment doctrine" is a distinct "equitable tolling doctrine, not an accrual doctrine." Pet. App. 19a. That is, where applicable, the doctrine of fraudulent concealment does not alter the definition of when a claim "accrues," but rather "toll[s] the limitations period . . . where the plaintiff

is able to establish that the defendant took affirmative steps beyond the allegedly wrongful activity itself to conceal her activity from the plaintiff." *Id.*[2]

Thus, when Congress first enacted the precursor to § 2462, extensive authority confirmed that the phrase "claim accrued" referred to the point in time at which each element of the claim existed, not the time at which the claim was discovered. Moreover, the government has pointed to no evidence of any alternative definition of accrual that existed for enforcement actions prior to 1839 for cases of mere fraud, rather than fraudulent concealment.

That Congress did not see the concept of accrual as incorporating a general discovery rule is further confirmed by the numerous statutes, including those sounding in fraud, that expressly provide for a discovery rule. For example, 28 U.S.C. § 1658 provides a general default rule that any "civil action arising under an Act of Congress" must be brought within "4 years after the cause of action accrues," but allows a private claim based on a violation of a regulatory requirement concerning the securities laws to be brought "2 years after the discovery of the facts constituting the violation." *See also* Federal Trade Commission Act, 15 U.S.C. § 1679i (action by the government "to enforce any liability under this

---

[2] The doctrine of fraudulent concealment is not implicated in this case. Although the SEC initially alleged fraudulent concealment in its complaint, the district court held that the SEC failed to plead concealment with sufficient particularity, and the SEC dropped its fraudulent concealment argument before the Court of Appeals. *See* Pet. 9 & n.3.

subchapter may be brought before the later of . . . the end of the 5-year period beginning on the date of the occurrence of the violation involved; or . . . the end of the 5-year period beginning on the date of the discovery by the consumer of the misrepresentation."); False Claims Act, 31 U.S.C. § 3731(b) (explaining that an FCA suit must be brought within six years of the date from which the fraudulent act occurred, or within three years of the date when the government official, responsible to act, knew or reasonably should have known the claim was false, but that the suit must in all events be within 10 years after the date of occurrence.). If Congress believed that a discovery rule in fraud cases was already a background assumption built into a general statute of limitations provision, these additional provisions would have been largely superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *id.* at 29 ("[I]ncorporating a general discovery rule into § 1681p would not merely supplement the explicit exception contrary to Congress' apparent intent; it would in practical effect render that exception entirely superfluous in all but the most unusual circumstances.").

II. THE GOVERNMENT'S ATTEMPT TO READ AN EXCEPTION INTO THE ESTABLISHED DEFINITION OF ACCRUAL UNDER § 2462 IS INCONSISTENT WITH SEPARATION OF POWERS.

Neither the government nor the Second Circuit has indentified a single case predating the original § 2462 that recognizes the rule they now seek. Nor has either identified any textual change in § 2462 that even hints that Congress intended to alter the definition of when a claim "accrued" to include a discovery rule. Instead, both have relied on cases that both arise in materially different contexts and *post-date* the original § 2462. U.S. Opp. 8 (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Exploration Co. v. United States*, 247 U.S. 435, 445-446 (1918); *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 348-349 (1875)).

As an initial matter, none of these cases actually held that a simple claim of fraud does not accrue until discovery. Rather, in each case the defendant had affirmatively concealed the wrongdoing. *See Holmberg*, 327 U.S. at 393 (defendant "concealed his ownership of one hundred shares of the Bank stock under [another name]"); *Exploration Co.*, 247 U.S. at 449-50 (defendants "added to the fraud by which [titles to lands] were obtained, artifices which enabled them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years"); *Bailey*, 88 U.S. at 348-49 (defendant "concealed from the parties interested the fraud which [was] sought to be redressed").

Even more importantly, though, all of the cases cited by the government and the Second Circuit post-date the initial enactment of the operative language of § 2462. Whatever the merits of those decisions, any attempt to read the decisions into § 2462 would be inconsistent with important rules of statutory interpretation and the principles of separation of powers that animate them.

When Congress enacts a law, it is "presume[d to] act with case law in mind." *Abuelhawa v. United States*, 556 U.S. 816, 821 (2009). Particularly where a statute employs a legal term of art that has been subject to extensive judicial interpretation, it is reasonable to infer that Congress intended to incorporate prior judicial interpretation. *See Williams v. Taylor*, 529 U.S. 362, 380–381, and n.12 (2000).

Once such a law is enacted, it reflects a legislative judgment that has been agreed to by both houses of Congress and signed by the president. At that point, judges are not free to alter the meaning of the statute; any change must come from a further act of Congress. A contrary approach would result in a law with a meaning that has never gone through the critical constitutional processes of bicameralism and presentment required by Article I. *See INS v. Chadha*, 462 U.S. 919, 957-58 (1983). Indeed, because such a process would produce a law with a meaning set by the courts, and never agreed to by Congress, it would result in courts making rather than enforcing legislation. That would be anathema to the constitutional structure established by the Framers. *See* The Federalist No. 78, at 425 (Alexander Hamilton) ("The judiciary. . . may truly be

said to have neither *force* nor *will* but merely judgment.")

Nor is it appropriate to assume that, when Congress recodified the predecessor versions of § 2462, its failure to change the statute's key language in reaction to later judicial interpretations reflected an implicit acquiescence to the approach to accrual taken in such cases. That approach would place an affirmative burden on Congress to respond to judicial decisions with which it disagrees. Yet, as recent experience confirms all too clearly, "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. 'It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). That is why, "absent . . . *overwhelming evidence* of acquiescence, [the Court is properly] loath to replace the plain text and original understanding of a statute with an amended . . . interpretation." *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (emphasis in original).

Besides, any inference that Congress's failure to change the operative language of § 2462 implicitly adopted later judicial acceptance of a discovery rule for fraud-based claims seeking civil penalties is particularly inappropriate here, for four reasons.

First, although the government claims later cases adopted a fraud-based discovery rule, *see supra* at 10-11, *all* of these cases involved *private* civil claims not subject to § 2462. *See Holmberg*, 327 U.S. at 393;

Exploration Co., 247 U.S. at 449-50;[3] *Bailey*, 88 U.S. at 348-49. Section 2462, however, deals exclusively with civil penalty actions brought by the government. As explained below, *infra* at 15-17, this distinction is a critical one; the government's ability to prosecute civil penalty actions is not impacted by simple fraud in the same manner as private civil actions. Thus, there is no basis to infer that Congress would have wanted to insert a discovery rule into § 2462 simply because intervening cases had applied equitable tolling to private fraud claims.[4]

Second, Congress made no significant changes to the 1839 version of the statute until 1948, when the provision was transferred to its current position as part of a "comprehensive revision of the Judicial Code." *3M*, 17 F.3d at 1458. Moreover, the Reviser's Notes describing the recodified § 2462 simply state that "[c]hanges were made in phraseology." *Id.* (quoting H.R. Rep. No. 308, 80th Cong., 1st Sess. A191 (1947)). "A long line of Supreme Court decisions compels the conclusion that the rewording did not render the new statute different in substance from the old. When the Reviser's Notes describe the alterations as changes in phraseology, the well-established canon of construction is that the revised

[3] Although the plaintiff in *Exploration Co.* was the government, the government was suing in its proprietary capacity as a defrauded landowner.

[4] For that matter, there is also no reason to assume that a fraudulent concealment exception could be read into § 2462. The plain text of the statute forecloses such an exception and there is no reason to assume that Congress would have wanted a rule that is sometimes applied in the context of private civil suits to be extended to the context of penal statutes.

statute means only what it meant before 1948." *Id.* (collecting cases).

Third, Congress included two express exceptions in the current version of § 2462; namely, that the 5-year limitation does not apply where "otherwise provided by Act of Congress" or if "the offender or the property is [not] found within the United States in order that proper service may be made thereon." As this Court has made clear, "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).

This inference is particularly compelling here, where the two exceptions would arguably have been implied even absent an express provision. That is, even absent the express language in § 2462, an alternative statute of limitations under a specific "Act of Congress" would likely trump the general provision of § 2462, *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932), and statutes of limitations have traditionally been tolled during the time a defendant is outside the jurisdiction. *Banister v. Solomon*, 126 F.2d 740, 743 (2d Cir. 1942) (Hand, J.). The fact that Congress went out of its way to make even these readily assumed exceptions explicit makes abundantly clear that it did not contemplate any additional exceptions.

Fourth, to the extent any inference is to be drawn from Congress's failure to amend § 2462, the post-enactment case law in fact suggests that Congress knew of and accepted the *absence* of any discovery

rule. Although the government cites case law interpreting *other* statutes of limitations, the cases interpreting § 2462 itself had (prior to the decision below) consistently rejected a discovery rule, even in cases of fraud. *See, e.g., United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954); *see also 3M*, 17 F.3d at 1461; *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *United States v. Core Labs., Inc.*, 759 F.2d 480, 482 (5th Cir. 1985); *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944), *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871); *see also* Brief for Petitioners 51-53. Thus, if congressional inaction is indeed relevant, the failure to amend § 2462 is most plausibly interpreted to show that Congress was aware of, and accepted, precedent holding that § 2462 does *not* include any fraud-based discovery rule. If these rulings had failed to recognize an exception to that rule that Congress intended to be recognized, Congress would have simply amended the statute to make its intentions clear.

III. EVEN IF COURTS WERE FREE TO ALTER THE MEANING OF "ACCRUE" IN § 2462, THERE WOULD BE NO BASIS TO CREATE A DISCOVERY RULE FOR GOVERNMENT FRAUD ACTIONS.

Even if courts were free to interpret § 2462 using the sort of common law approach urged by the government, several factors would counsel strongly against importing any fraud-based discovery rule into § 2462.

A. The Core Rationale For Applying A Discovery Rule In Private Fraud Actions Does Not Apply To Government Enforcement Actions.

The discovery rule, by "rest[ing] on the idea[s] that plaintiffs cannot have a tenable claim for the recovery of damages unless and until they have been harmed" and that "hidden injuries . . . are viewed as not accruing until the harm becomes apparent," is a sort of "discovery of injury" rule. *3M*, 17 F.3d at 1460. Fraud-based discovery rules for private claims reflect an assessment that fraud claims are unusually difficult for private parties to bring promptly upon accrual. A private party must generally be directly injured by a fraud before bringing suit, and like claims involving "latent disease and medical malpractice," the injury to an individual from fraud is often not self-apparent for some time. *TRW Inc.*, 534 U.S. at 27. Relatedly, fraud-based discovery rules implicitly recognize that private parties cannot fairly be expected to continually and proactively investigate all the relationships in their lives for potential fraud.

In stark contrast to private civil plaintiffs, however, the government generally need not suffer any injury itself before bringing a civil enforcement action. *E.g.*, 15 U.S.C. § 80b–9(e) (authorizing civil penalties under Investment Advisers Act without showing of injury). Moreover, government agencies such as the SEC have extensive investigatory staff, with broad investigatory powers, whose very purpose is to seek out and police potential civil violations. *E.g.*, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744-45 (1984) (describing breadth of SEC investigatory

powers). What the government seeks here is not an application of the discovery of injury rule, but rather the creation of a "'discovery of violation' rule having nothing whatever to do with the problem of latent injuries" that the discovery rule is meant to address and which undermines the purpose of having an agency actively monitoring for regulatory violations. *3M*, 17 F.3d at 1460.

Within the class of claims for civil penalties that the government can bring, there is nothing unique about the subset based on fraud that would support reading § 2462 to contain a discovery rule for just that subset. To the contrary, whether the government is pursuing claims for civil penalties for fraud, or for the unlawful discharge of air pollutants under 42 U.S.C. § 7413, or for discrimination in rental housing under 42 U.S.C. § 3614, it must seek out any violations without direct injury or notice. Indeed, actively ensuring compliance with the laws is an essential purpose of government agencies. Thus, "[t]he rationale underlying the discovery of injury rule . . . is completely inapposite [where t]he statute of limitations [at issue] is aimed exclusively at restricting the time within which actions may be brought to recover fines, penalties and forfeitures." *3M*, 17 F.3d at 1460; *see also Trawinski v. United Technologies*, 313 F.3d 1295, 1298 (11th Cir. 2002) (per curiam) ("Th[e] discovery rule, which might be applicable to statutes of limitations in state tort actions, has no place in a proceeding to enforce a civil penalty under a federal statute.").

B. The Government's Approach Would Undermine The Central Purpose Of § 2462 By Creating An Indefinite Threat Of Government Enforcement Actions.

The government's proposed discovery exception to the conventional definition of accrual subjects a private party to the threat of an enforcement action forever. The government rarely receives notice of potential regulatory violations unless it chooses to look for them. Accordingly, under the government's rule, an agency can target a disfavored company or individual at any time, review decades of past conduct for potential regulatory violations, and bring stale claims long after the relevant events have passed. The Court should be loath to infer that Congress intended to impliedly produce this risk, for two key reasons.

First, such a result would undermine the well-established and long-respected purposes of statute of limitations to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *see also United States v. Kubrick*, 444 U.S. 111, 125 (1979) ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable."). By subjecting individuals and businesses to the indefinite threat of stale claims at any time, the government's rule would

both chill innocent and valuable activities and impose an unacceptable risk that innocent parties will be subjected to old claims due to the loss of exculpatory evidence.

These policies of repose and certainty are particularly significant where a defendant will not only be liable for compensatory damages in a private civil suit, but also may be subject to the additional reputational and financial costs of civil punishment. Civil penalties carry additional stigma and damages, and, indeed, can have many of the characteristics of criminal punishment. *United States v. Ward*, 448 U.S. 242, 252-53 (1980). Accordingly, as Chief Justice Marshall observed long ago, "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

Second, the government's approach is particularly problematic given the breadth and vagueness of federal punishments. Although it has become commonplace for Congress to respond to perceived market failures by creating additional layers of federal regulation, few regulatory requirements are ever repealed. The result is an unprecedented and ever-growing array of potential claims by the government for civil penalties. *See, e.g.*, Clyde Wayne Crews, *Ten Thousand Commandments 2012: An Annual Snapshot of the Federal Regulatory State* at 5 (estimating that, from 2002 to 2011, the number of "economically significant" final rules completed increased by 165% and the aggregate enforcement

budget of federal agencies increased by 40% (to a total of $54 billion).[5]

Worse, many regulatory requirements, including the provision at issue in this case, are based on vague language that can be subject to new and unpredictable interpretations. Given the breadth and uncertainty or regulatory requirements, numerous activities that do not appear unlawful at one time, may later become the focus of government enforcement actions. This case aptly illustrates that phenomenon, as the SEC has sought penalties based on conduct that, a decade ago (during the time of the defendants' alleged conduct), it was well aware of but chose not to pursue. *See* Mark Roche, Sean Adams, and Scott Frewing, *Will the SEC Have Forever to Pursue Securities Violations? SEC v. Gabelli*, 44 SRLR 1415, 1418 n.3 (2012) (describing that "the government stipulated in a separate case that '[b]eginning in the mid 1990s, the SEC knew about the practice of market timing in mutual funds, and the decision was to let the marketplace regulate itself.'") (quoting Trial Tr. at 2186-87, *SEC v. O'Meally*, No. 06-cv-06483 (LTS) (S.D.N.Y. 2011)); *cf. also Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (holding that the government responded to the Enron scandal by prosecuting executives based on a definition of "honest services fraud" that exceeded historical parameters and created grave constitutional concerns).

Accordingly, eliminating any time bar on government enforcement actions would expose individuals and businesses not only to an

---

[5] *Available at* http://cei.org/sites/default/files/Wayne Crews 10,000 Commandments 2012_0.pdf.

unacceptable risk of lost evidence or recollection, but also to a far greater risk of government enforcement actions based on novel theories that are pursued in response to shifting political winds.

Nor is this indefinite and unpredictable risk of civil enforcement actions adequately mitigated by the possibility that a litigant could show that the relevant agency failed to diligently pursue its claims. Litigating and proving such a defense would be far more costly and burdensome than simply showing that a claim accrued outside the relevant statute of limitations. Besides, the mere fact that a government agency has *filed* an enforcement action can harm or even destroy a business in a manner that is seldom caused by the filing of a private lawsuit. Earning the dismissal of an enforcement action after extensive discovery, litigation, and reputational harm is cold comfort at best.[6]

C. Any Ambiguity Should Be Resolved In Favor Of Lenity As Penal Laws Must Be Narrowly Construed.

Finally, were there any remaining doubt about the meaning of "accrued" in § 2462, such ambiguity should be resolved in favor of defendants.

"The law is settled that 'penal statutes are to be construed strictly." *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (quoting *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U. S. 284, 296 (1954)). Accordingly, "a penalty is not to be readily implied, and on the contrary . . . a person or

[6] Such a rule would also place extreme importance on how an agency investigates potential violations, which would pull the courts into lengthy, disputed, and contentious discovery regarding agency investigation methods.

corporation is not to be subjected to a penalty unless the words of the statute plainly impose it." *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905); *see also Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 410 (1873) ("In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction.").

The foregoing presumption squarely applies to § 2462, which regulates solely civil penalties. Even if § 2462 could arguably be read to allow the expanded application of civil penalties based on a fraud-discovery rule, it certainly cannot be said that "the words of the statute plainly impose" such a rule. *Keppel*, 197 U.S. at 362. The availability of civil penalties should therefore not be "readily implied." *Id.*

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

ILYA SHAPIRO
DAVID SCOTT
CATO INSTITUTE
1000 Massachusetts Ave. NW
Washington D.C. 20001
(202) 842-0200
ishapiro@cato.org
dscott@cato.org

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Dr.
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

WARREN D. POSTMAN
JONES DAY
51 Louisiana Avenue N.W.
Washington, D.C. 20001

November 16, 2012

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1274

Supreme Court, U.S.
FILED
NOV 15 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

LISA S. BLATT
CHRISTOPHER S. RHEE
ROSEMARY F. SMITH
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

MARY MASSARON ROSS
President of DRI
Counsel of Record
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
mmassaron@
plunkettcooney.com

Counsel for Amicus Curiae
DRI – The Voice of the Defense Bar

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. A DISCOVERY RULE FOR PENALTY ACTIONS SOUNDING IN FRAUD UNDERMINES THE CORE LEGISLATIVE OBJECTIVES OF STATUTES OF LIMITATIONS	4
A. Statutes of Limitations Further Substantial Legislative Objectives	4
B. The Second Circuit's Decision Is An Unwarranted Departure From Statutes Of Limitations Objectives	7
II. A DISCOVERY RULE FOR PENALTY ACTIONS SOUNDING IN FRAUD WOULD IMPOSE SUBSTANTIAL BURDENS ON DEFENDANTS	10
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page(s)

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 2, 7, 9, 10

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 7

Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,
483 U.S. 143 (1987) 5

Bailey v. Glover,
88 U.S. (21 Wall.) 342 (1874) 9, 12

Ballen v. Prudential Bache Sec., Inc.,
23 F.3d 335 (10th Cir. 1994) 13

Burnett v. N.Y. Cent. R.R. Co.,
380 U.S. 424 (1965) 5

Dabney v. Levy,
191 F.2d 201 (2d Cir. 1951) 9

FEC v. Williams,
104 F.3d 237 (9th Cir. 1996) 10

Holmberg v. Ambrecht,
327 U.S. 392 (1946) 9, 10-11

J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.,
76 F.3d 1245 (1st Cir. 1996) 12, 13

Merck & Co. v. Reynolds,
130 S. Ct. 1784 (2010) 2, 9, 11, 12

Rotella v. Wood,
528 U.S. 549 (2000) 5

S.E.C. v. Bartek,
No. 11-10594, 2012 WL 3205446
(5th Cir. Aug. 7, 2012) 3, 13

TABLE OF AUTHORITIES—Continued

Page(s)

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 9

United States v. Core Labs., Inc., 759 F.2d 480 (5th Cir. 1985) 7, 10

United States v. Kubrick, 444 U.S. 111 (1979) 4, 5

United States v. Lindsay, 346 U.S. 568 (1954) 2, 8

Wood v. Carpenter, 101 U.S. 135 (1879) 5, 12

STATUTES, REGULATIONS, AND RULES

19 U.S.C. § 1621(1) 2, 8

28 U.S.C. § 2415(b) 8

28 U.S.C. § 2416(c) 8

28 U.S.C. § 2462 ..... *passim*

31 U.S.C. § 3731(b) 8

54 Fed. Reg. 18716 (May 2, 1989) 6

Federal Rule of Civil Procedure 9(b) 12

OTHER AUTHORITIES

148 Cong. Rec. S7419 (daily ed. July 26, 2002) 6

James W. Beasley, Jr., Comm. on Fed. Reg. of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986) 5-6

TABLE OF AUTHORITIES—Continued

Page(s)

Thomas M. Jones et al., *Formulating a Records Retention Policy*, 50 No. 1 DRI For Def. 42 (2008) 6

INTEREST OF *AMICUS CURIAE* [1]

DRI – The Voice of the Defense Bar ("DRI") is an international membership organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to anticipating and addressing issues germane to defense attorneys and to improving the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. DRI members routinely defend clients in civil government penalty actions for alleged violations of federal law, and have extensive experience with statutes of limitations defenses.

To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of importance to its members, their clients, and the judicial system. This case is of critical importance to all three of these groups. The Second Circuit decision below, if not overruled, would have significant adverse consequences for defendants in federal civil penalty litigation, as well as for the justice system in general. By greatly expanding the government's ability to extract penalties years after alleged misconduct, the decision would undercut the very purpose of statutes of limitations. Statutes of limitations protect the truth-seeking and fairness principles of litigation, and provide businesses with the certainty necessary to

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

efficiently manage litigation risk. Moreover, the impact of the Second Circuit's decision would be far-reaching; it would affect penalty actions filed by many different federal agencies, compelling defendants to spend time and resources to litigate stale claims. DRI submits this brief to emphasize these profoundly negative consequences that would flow from the decision below.

SUMMARY OF ARGUMENT

Section 2462 of Title 28 is a "general statute of limitations, applicable . . . to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise." *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994). It states that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." 28 U.S.C. § 2462.

"In common parlance a right accrues when it comes into existence," not when it is discovered. *United States v. Lindsay*, 346 U.S. 568, 569 (1954). When legislatures have intended that a statute of limitations begin to run when the claim is discovered (or reasonably could be discovered), they have "written the word 'discovery,'" or similar language, "directly into the statute." *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1794 (2010). Such express discovery rules can be found in several federal penalty provisions relating to fraud. *See, e.g.*, 19 U.S.C. § 1621(1) (for government penalty action, limitations period of five years after date of alleged violation "or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud"). Section 2462 contains no such

language. Thus, "[a] plain reading of [Section] 2462 reveals no discovery rule . . . ." *S.E.C. v. Bartek*, No. 11-10594, 2012 WL 3205446, at *3 (5th Cir. Aug. 7, 2012).

Despite the statute's plain terms, the Second Circuit concluded that a discovery rule should nevertheless be grafted onto Section 2462 "for claims that sound in fraud." Pet. App. 20a. This novel reading of Section 2462 is unsupported by the statutory text and this Court's precedent. Permitting federal agencies to look years into the past to bring stale penalty claims would undermine the core legislative objectives of statutes of limitations—to protect the truth-seeking and fairness principles of litigation and to provide repose.

The Second Circuit's ruling has far-reaching implications for defendants in penalty actions. It would vastly expand the authority of many different federal agencies to pursue penalty actions by reaching into the past. It would mire defendants in costly litigation even when there is a claim that the government should have discovered the alleged misconduct earlier. It would leave defendants continuously vulnerable to suit even when there is no indication that they attempted to conceal their conduct. Contrary to the views of the Second Circuit and Respondent, these results cannot be countenanced in our justice system.

ARGUMENT

I. A DISCOVERY RULE FOR PENALTY ACTIONS SOUNDING IN FRAUD UNDERMINES THE CORE LEGISLATIVE OBJECTIVES OF STATUTES OF LIMITATIONS

The government typically discovers violations of federal laws through active investigations. Therefore, the Second Circuit's discovery rule would mean that the statute of limitations would not begin to run in a typical fraud case unless and until the government opened an investigation and collected evidence that it believed suggested that a violation occurred. Effectively, such a rule would provide little incentive for the government to launch timely investigations or to conclude them on a timely basis. Such a rule would also empower the government to investigate conduct that occurred many years in the past, without concern that a potential fraud claim would be time barred. This result is directly contrary to the core legislative objectives of statutes of limitations like Section 2462.

A. Statutes of Limitations Further Substantial Legislative Objectives

Statutes of limitations represent a "pervasive legislative judgment . . . that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). This judgment is well-grounded in significant policy objectives, frequently recognized by this Court.

1. From the perspective of the defense bar, protection of the truth-seeking and fairness principles of litigation is one of the most salient objectives achieved through statutes of limitations. Limitations provisions "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.* They also ensure fairness for defendants, who ought to be put "on notice to defend within a specified period of time," *id.*, and preserve the resources of courts, which "ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

2. Even beyond the confines of litigation, however, statutes of limitations promote "repose . . . and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *see also Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (statutes of limitations "giv[e] security and stability to human affairs"). This certainty has significant real world consequences.

For example, statutes of limitations assist corporate defendants in accurately calculating their contingent liabilities. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150 (1987) ("Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." (quoting *Wilson v. Garcia*, 471 U.S. 261, 275 n.34 (1985))). As an American Bar Association Task Force has explained, "with no specific maximum cutoff" for timely suits, "managements of publicly held companies, as well as their auditors

and attorneys, are frequently unable to assess the impact of possible litigation," which "deprives investors of information adequate for informed evaluation of [the] companies' potential liabilities." James W. Beasley, Jr., Comm. on Fed. Reg. of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 647 (1986).

3. Statutes of limitations also allow businesses to establish manageable document retention policies, calibrated to the length of time in which claims might be brought against them. The defense bar has counseled that statutes of limitations are an "important consideration for an organization seeking to formulate a records retention policy." Thomas M. Jones et al., *Formulating a Records Retention Policy*, 50 No. 1 DRI For Def. 42 (2008). The government has naturally looked to applicable statutes of limitations in developing document retention rules and regulations. *See, e.g.*, 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Senator Leahy) ("[I]t is intended that the SEC promulgate rules and regulations that require the retention of such substantive material . . . for such a period as is reasonable and necessary for effective enforcement of the securities laws and the criminal laws, most of which have a five-year statute of limitations."); 54 Fed. Reg. 18716, 18765 (May 2, 1989) ("EPA chose to require a five-year period [for record retention] because the Federal statute of limitations for [Clean Water Act] violations is five years."). Absent meaningful limitations periods, businesses must choose to either absorb the costs of retaining their documents indefinitely or run a significant risk that they will not be able to marshal relevant evidence in defending against late-filed actions.

B. The Second Circuit's Decision Is An Unwarranted Departure From Statutes Of Limitations Objectives

There is no support for the Second Circuit's view that Congress intended to cast aside these substantial legislative objectives by providing the government with the authority to reach deep into the past and bring penalty actions "sound[ing] in fraud" many years after the alleged misconduct.

Long ago, this Court characterized the absence of a limitations period for penalty actions as "utterly repugnant to the genius of our laws," since "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). Other circuit courts that have refused to read a discovery rule into Section 2462 have similarly held that such a rule would be incompatible with basic statutes of limitations principles. *See 3M*, 17 F.3d at 1462-63 (D.C. Cir. 1994) ("We reject the discovery of violation rule . . . as . . . incompatible with the functions served by a statute of limitations in penalty cases."); *United States v. Core Labs., Inc.*, 759 F.2d 480, 483 (5th Cir. 1985) ("The interpretation of § 2462 [that would prevent the statute from running from the date of the violation] . . . is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them.").

On its face, Section 2462 contains no discovery rule. Congress chose to begin the five-year limitations period "when the claim first accrue[s]," 28 U.S.C. § 2462, a phrase that is universally under-

stood to mean the point at which a claim arises. *See, e.g.*, *Lindsay*, 346 U.S. at 569 ("In common parlance a right accrues when it comes into existence . . . ."). In other words, in a fraud case, the period would begin to run upon the commission of the act that constitutes the alleged fraud. In contrast, when Congress has intended to impose a discovery rule, it has explicitly written the rule into the law.[2]

Circumventing this plain statutory language, the Second Circuit reasoned that in government penalty cases there is a background "presumption that the discovery rule applies to [fraud] claims unless Congress directs otherwise." Pet. App. 20a. As detailed above, however, courts have consistently recognized the importance of imposing time limits on the government's ability to impose penalties. And each of the cases on which the Second Circuit relied to reach a contrary conclusion, *id.* at 18a-20a, addressed a very different question—whether a discovery rule should be implied in a remedial action filed by a victim seeking compensation for an injury that is diffi-

---

[2] *See, e.g.*, 28 U.S.C. §§ 2415(b), 2416(c) (for government tort action seeking money damages, three-year limitations period running from when "right of action first accrues" excluding, *inter alia*, "all periods during which . . . facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"); 31 U.S.C. § 3731(b) (for civil action under False Claims Act, limitations period of six years after date of violation "or . . . 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official . . . charged with responsibility to act in the circumstances"); 19 U.S.C. § 1621(1) (for government penalty action, limitations period of five years after date of alleged violation "or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud").

cult to detect. None of the cases relied on below involves claims by the government seeking to impose a penalty.

In *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874), for example, the court described the "proposition that where *the party injured by the fraud* remains in ignorance of it . . . the bar of the statute does not begin to run until the fraud is discovered . . . ." (emphasis added).[3] The discovery rule as applied to cases involving injured parties reflects an attempt "to strike the balance between remediation of all injuries and a policy of repose." *TRW*, 534 U.S. at 38 (Scalia, J., concurring). That balancing has no application in a penalty action, where injury is not an element of the claim. *See 3M*, 17 F.3d at 107 ("In an action for a civil penalty . . . injuries or damages resulting from the violation are not part of the cause of action . . . .").

Reading an extra-textual discovery rule into the unqualified plain language of Section 2462 thus conflicts with clear and well-grounded legislative judgments about the need for limits on the government's ability to extract penalties for conduct deep in the past.

---

[3] *See also TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) ("The *injury-discovery* rule . . . [is a] historical exception for suits based on fraud . . . ." (emphasis added)); *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946) ("[W]here *a plaintiff has been injured* by fraud . . . the bar of the statute does not begin to run until the fraud is discovered . . . ." (emphasis added) (internal quotation marks omitted)); *Dabney v. Levy*, 191 F.2d 201, 205 (2d Cir. 1951) ("[T]he period of limitation . . . begins to run after *the injured party* has discovered . . . the wrong." (emphasis added) (internal quotation marks omitted)); *Merck*, 130 S. Ct. at 1793-94 (citing *Holmberg* and *Bailey* in case involving codified discovery rule).

II. A DISCOVERY RULE FOR PENALTY ACTIONS SOUNDING IN FRAUD WOULD IMPOSE SUBSTANTIAL BURDENS ON DEFENDANTS

The Second Circuit's reading of Section 2462—imposing a discovery rule notwithstanding the plain language of the statute—has far-reaching implications for defendants in penalty actions. Section 2462 is a catch-all provision that applies to numerous actions brought by different federal agencies, not simply the Respondent here. *See, e.g.*, *3M*, 17 F.3d at 1454 (suit by EPA to enforce Toxic Substances Control Act); *FEC v. Williams*, 104 F.3d 237, 238 (9th Cir. 1996) (suit by FEC to enforce Federal Election Campaign Act); *Core Labs.*, 759 F.2d at 481 (suit by Commerce Department to enforce antiboycott provision of The Export Administration Act). As Petitioners correctly note, many of these penalty actions sound in fraud and accordingly would be affected by the Second Circuit's novel reading of the law. *See* Pet. Br. at 47-48.

Respondent has argued that the Second Circuit's creation of a discovery rule has no practical significance because, absent a discovery rule, the government could still rely on equitable tolling for fraudulent concealment to bring stale penalty actions in fraud cases. *See* Opp. Pet. Cert. at 10-11 ("[I]t is 'unimportant in practice' '[w]hether a court says that a claim for fraud accrues only on its discovery . . . or instead says that the claim accrues with the wrong, but that the statute of limitations is tolled until the fraud's discovery.'" (quoting *SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009))). This Court has never held that equitable tolling applies to Section 2462 or any penalty provision. *Cf. Holmberg*, 327 U.S. at 395

("Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications."). Even assuming *arguendo* that equitable tolling is available to the government in penalty actions covered by Section 2462, Respondent's argument is still wrong. The Second Circuit's discovery rule would invariably impose substantial new burdens on the defense in penalty actions that sound in fraud.

To invoke the discovery rule in a suit under Section 2462, the government would only need to demonstrate that it "did [not] discover [and] a reasonably diligent plaintiff would [not] have discovered the facts constituting the violation" at least five years prior to filing suit. *Merck*, 130 S. Ct. at 1798 (internal quotation marks and alterations omitted); *see also* Pet. App. 19a ("[S]ince the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme, we hold that the discovery rule defines when the claim accrues . . . ."). As demonstrated by the ruling below, this is a low hurdle for the government to clear. Under the Second Circuit's ruling, the government does not need to plead reasonable diligence. *See* Pet. App. 21a. It is sufficient that "the complaint expressly alleges that the SEC first discovered the facts of defendants' fraudulent scheme" less than five years before filing suit. *Id.*

Even in cases where the government arguably should have discovered a violation earlier, it will be difficult for defendants to invoke the statute of limitations to seek dismissal of a penalty action. As the Second Circuit held, the "lapse of a limitations period is an affirmative defense that a defendant must plead

and prove and dismissing claims on statute of limitations grounds at the complaint stage is appropriate only if a complaint clearly shows the claim is out of time." Pet. App. 21a (internal quotation marks and citation omitted). The relevant evidence is the government's own knowledge and diligence, facts which the government need not plead. It is therefore unlikely that a defendant would have the necessary information to challenge the timeliness of an action until after significant pre-trial discovery. *See, e.g.*, *Merck*, 130 S. Ct. at 1790, 1792, 1799 (affirming denial of motion dismiss complaint as untimely under express discovery rule because, based on the pleadings, "the plaintiffs did not discover, and [defendant] has not shown that a reasonably diligent plaintiff would have discovered, the facts constituting the violation" prior to relevant date (internal quotation marks omitted)). By that time, a defendant would have already suffered substantial financial and reputational costs from the litigation irrespective of the final outcome.

In contrast, to invoke equitable tolling for fraudulent concealment, the government would have to plead an additional element: that the defendant actively concealed the fraud or committed a fraud "of such character as to conceal itself" from the victim. *Bailey*, 88 U.S. (21 Wall.) at 349-50. As this Court noted: "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Wood,* 101 U.S. at 143. Federal courts have also required that a plaintiff plead fraudulent concealment with particularity as to each defendant under Rule 9(b) of the Federal Rules of Civil Procedure. *See, e.g.*, *J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1255 (1st Cir. 1996), *cert. denied*,

519 U.S. 823 (1996); *Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 337 (10th Cir. 1994).

Because fraudulent concealment requires additional evidence of misconduct, and must be pled with particularity, it is not an option for the government in many cases (including here, where there are no indications that Petitioners attempted to frustrate the filing of a timely claim). Moreover, a defendant is far better situated to challenge an allegation of fraudulent concealment early in the litigation, by motion. *See, e.g.*, *Bartek*, 2012 WL 3205446, at *1 n.2, *5 n.7 (noting district court had granted summary judgment for defendant despite fraudulent concealment claim because it found "no conduct concealing fraud"); *J. Geils Band*, 76 F.3d at 1255-60 (affirming grant of summary judgment for defendant despite fraudulent concealment claim); *Ballen*, 23 F.3d at 337 (affirming grant of motion to dismiss despite fraudulent concealment claim for failure to plead "any basis for believing that [defendant] had attempted to keep any information from [plaintiff]").

For defendants in penalty actions, the difference between a discovery rule and equitable tolling for fraudulent concealment is much more than a matter of semantics. The discovery rule focuses only on the nature of the underlying violation and when the government knew or should have known about it. Under the Second Circuit's ruling, a defendant who engages in no effort to conceal his or her conduct from the government (but simply declines to self-report it) may be subject to an extended statute of limitations simply because the government did not open an investigation earlier. Additionally, the discovery rule's lenient pleading requirements greatly increase the risk that a defendant will have to spend time and

money, and suffer reputational damage, in extended litigation. For defendants, the certainty and repose afforded by Section 2462 is very much at stake.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

LISA S. BLATT
CHRISTOPHER S. RHEE
ROSEMARY F. SMITH
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

MARY MASSARON ROSS
President of DRI
Counsel of Record
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
mmassaron@
plunkettcooney.com

Counsel for Amicus Curiae
DRI – The Voice of the Defense Bar

November 16, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
MOTION FILED

RECORD NOV 21 2012
AND
BRIEF
William K. Suter,
Clerk

No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER SEC COMMISSIONERS AND OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OUT OF TIME

LEE S. RICHARDS
Counsel of Record
ARTHUR S. GREENSPAN
DANIEL L. STEIN
WENDY A. HARRIS
RICHARDS KIBBE & ORBE LLP
One World Financial Center
New York, NY 10281-1003
(212) 530-1800
lrichards@rkollp.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OUT OF TIME

Pursuant to Supreme Court Rule 37.3, *Amici Curiae* listed in Appendix 1a respectfully move for leave to file an *amici curiae* brief out of time, and to file the accompanying *amici curiae* brief in support of Petitioners.

Letters from counsel for the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). In addition, counsel for Petitioners and Respondent do not oppose this motion for leave to file out of time an *amici curiae* brief of former Commissioners and Officials of the Securities and Exchange Commission in support of Petitioners.

Amici request the opportunity to file out of time due to the circumstances of the recent Hurricane Sandy that affected much of the northeast, and particularly New York and New Jersey. As a result of that storm, some of the *amici*, as well as their counsel, were unable to fully address the significant issues presented in this case by November 16 as expected.

As all parties consent to the filing of this *amici* brief, as well as to *amici* filing this brief by November 21, 2012, the granting of this motion would not prejudice Respondent. Accordingly, *amici* respectfully request leave to file out of time the accompanying brief in support of Petitioners.

Respectfully submitted,

LEE S. RICHARDS
Counsel of Record
ARTHUR S. GREENSPAN
DANIEL L. STEIN
WENDY A. HARRIS
RICHARDS KIBBE & ORBE LLP
One World Financial Center
New York, NY 10281
(212) 530-1800
lrichards@rkollp.com

Counsel for Amici Curiae

November 21, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. APPLYING A DISCOVERY RULE TO SEC ANTIFRAUD PENALTY CLAIMS UNDERMINES THE EFFECTIVENESS AND FAIRNESS OF THE SEC'S ENFORCEMENT PROGRAM. 4

A. The SEC Has Consistently Emphasized Prompt Investigation And Prosecution Of Violations. 4

B. A Discovery Rule Would Undermine Principles Of Repose Important To Public Confidence In The Law And The SEC. 10

C. The Existing Five-Year Limitations Period In Section 2462 Is An Appropriate Period For The SEC To Bring Antifraud Penalty Claims. 12

II. APPLYING A DISCOVERY RULE TO SECTION 2462 COULD BE DISRUPTIVE AND DAMAGING TO THE SEC BECAUSE IT COULD SUBJECT ITS INVESTIGATIVE AND ENFORCEMENT PROCESSES TO DISCOVERY AND SECOND-GUESSING. . . . 14

A. The Discovery Rule Adopted By The Second Circuit Could Expose Current And Former SEC Staff Members And Investigative Files To Discovery. 15

B. Judicial Inquiry Into The Staff's Knowledge Infringes Upon The Constitutional Separation Of Powers And Long-Standing Principles Of Deference To Administrative Agencies. 18

C. Public Scrutiny Of SEC Investigative Files Would Jeopardize Effective Enforcement. . . 21

CONCLUSION 23

APPENDIX

Appendix A: List of *Amici* 1a

TABLE OF AUTHORITIES

Page(s)

CASES

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 19, 20

Baltimore Gas and Elec. Co. v. F.E.R.C.,
252 F.3d 456 (D.C. Cir. 2001) 20

Bice v. Robb,
No. 08-1421, 324 Fed.Appx. 79 (2d Cir. April 28, 2009) 16, 17

Campbell v. Haverhill,
155 U.S. 610 (1895) 10

Confiscation Cases,
7 Wall. 454 (1869) 20

Douglas Oil Co. v. Petrol Stops Northwest,
441 U.S. 211 (1979) 21

Heckler v. Chaney,
470 U.S. 821 (1985) 19, 20

In re City of New York,
607 F.3d 923 (2d Cir. 2010) 17

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975) 17

Rotella v. Wood,
528 U.S. 549 (2000) 10

SafeCard Servs., Inc. v. SEC,
926 F.2d 1197 (D.C. Cir. 1991) 17

United States v. Walsh,
700 F.2d 846 (2d Cir. 1983) 15

United States v. Batchelder,
442 U.S. 114 (1979) 20

United States v. Nixon,
418 U.S. 683 (1974) 20

Vaca v. Sipes,
386 U.S. 171 (1967) 20

Wood v. Carpenter,
101 U.S. 135 (1879) 11

STATUTES

5 U.S.C. § 552(b)(7) 22

28 U.S.C. § 1658(b) 13

28 U.S.C. § 2462 . . . . . *passim*

15 U.S.C. § 78d-5(a) 11

CONSTITUTIONAL PROVISION

U.S. Const. Art. II 20

RULES

Fed. R. Civ. P. 26(b)(1) 15

Fed. R. Civ. P. 26(b)(2) 16

Fed. R. Civ. P. 26(b)(3)(A) 17

Fed. R. Civ. P. 26(c) 21

Fed. R. Crim. P. 6(e) 21

Sup. Ct. R. 37.3 i

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

C. Wright & A. Miller, 5 Fed. Prac. & Proc. Civ. § 1270 (3d ed. 2012) 15

Harvey Pitt, Remarks at the PLI 33rd Annual Institute on Securities Regulation (Nov. 8, 2001), available at http://www.sec.gov/news/speech/spch520.htm 6

Hearing on Improvement of Procedures in Claims Settlement and Government Litigation, House Committee on the Judiciary, 89th Cong., 2d Sess. (April 6, 1966) (statement of John W. Douglas, Assistant Attorney General, Civil Division, Department of Justice) 11, 12

Mary L. Schapiro, Testimony Before the Subcommittee on Financial Services and General Government Committee on Appropriations, U.S. House of Representatives (March 6, 2012) available at http://www.sec.gov/news/testimony/2012/ts030612mls.htm . . 5, 6

Robert Khuzami, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), available at http://www.sec.gov/news/speech/2009/spch080509rk.htm 7

Robert Khuzami, Remarks at SIFMA's Compliance and Legal Society Annual Seminar (March 23, 2011), available at http://www.sec.gov/news/speech/2011/spch032311rk.htm 6, 7

Robert Khuzami, Testimony Concerning Strengthening the SEC's Vital Enforcement Responsibilities, Before the U.S. Senate Banking, Housing, and Urban Affairs Subcommittee on Securities, Insurance and Investment (May 7, 2009), available at http://www.sec.gov/news/testimony/2009/ts050709rsk.htm 5

Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 Bos. Col. L. Rev. 691 (1998) 15

Brief of Former SEC Commissioners and Officials As *Amici Curiae* in Support of Petitioners

INTEREST OF *AMICI CURIAE*[1]

Amici are former commissioners and senior staff members of the Securities and Exchange Commission ("SEC") who respectfully submit this brief because of their career-long commitment to effective administration of the federal securities laws. As individuals who formulated and executed policy for the agency, each of the *amici* played a key role in deciding how and when to investigate and prosecute SEC enforcement actions, how to husband the limited resources of the SEC, and how to promote sound policy under the securities laws. A complete list of *amici* can be found in the Appendix at page 1a.

Amici support the just administration of the federal securities laws and believe in the principle that fairness and the perception of fairness are critical to the process of promoting that policy. They submit this brief to articulate their concern that the Second Circuit's rule allowing the institution of antifraud

---

[1] The parties have consented to the filing of this brief. Petitioners and respondent have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

penalty cases more than five years after the violation occurred could undermine law enforcement goals and reduce rather than promote efficient law enforcement. In addition, *amici* are concerned that the nature of the discovery rule articulated by the Second Circuit could subject the SEC and other agencies to inappropriate and potentially damaging judicial inquiry into the processes leading to the institution of agency proceedings. All *amici* share these concerns and believe that the Court should reverse the judgment of the court of appeals, though each individual *amicus* may not endorse every argument presented in this brief.

SUMMARY OF ARGUMENT

Petitioners have persuasively argued that the text, structure and history of Section 2462 of Title 28, United States Code ("Section 2462") does not support an implied discovery rule for fraud-based claims.[2] Moreover, *amici* believe that the purposes behind this statute of limitations are important not only to defendants and those under investigation, but also to the government and all those concerned with effective enforcement of the laws. As former SEC commissioners and officials, *amici* believe that statutes

---

[2] By its terms, Section 2462 applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," and requires such actions to be "commenced within five years from the date when the claim first accrued." This case concerns the latter standard – and whether courts should imply a discovery rule to that standard – but not the former, and thus it does not address the definition or scope of penalty actions within the meaning of Section 2462.

of limitation in penalty cases are critical to the public's confidence in the fairness of the system. Such statutes also provide salutary limits on the government's ability to punish old behavior which, in turn, promotes the efficient and timely investigation and prosecution of potential legal violations.

A discovery rule could undermine the effectiveness of the SEC's enforcement program by undercutting its longstanding message of prompt investigation and prosecution. It could also undermine the critical purposes of repose and certainty underlying the statute of limitations, and, by permitting the prosecution of old cases, damage the public's perception that the securities laws are fairly and timely enforced. If the SEC needs additional time to bring penalty actions, then that issue should be addressed through tolling agreements in particular cases and, more broadly, through requests to Congress for additional resources or an extension of the statutory limitations period.

In addition, a discovery rule would likely involve the federal courts in damaging and intrusive discovery regarding the SEC's investigative and decision-making processes, the particular information received by SEC investigators (and collaborating agencies), including information received from confidential informants, and the analyses performed, the decisions made and actions taken by those investigators. In the view of *amici*, such an inquiry would be detrimental to sound public policy and encroach on principles of separation of powers. It also would focus the courts unnecessarily on the actions of government agencies rather than those of defendants in securities fraud cases.

Finally, *amici* note that the doctrine of equitable tolling based on a defendant's fraudulent concealment is not at issue here. The court below properly distinguished the concept of a defendant's fraudulent concealment (which focuses on the defendant's conduct) from a discovery rule (which focuses solely on the knowledge and diligence of government agencies), and clearly grounded its ruling on the discovery rule.

ARGUMENT

I. Applying A Discovery Rule To SEC Antifraud Penalty Claims Undermines the Effectiveness And Fairness Of The SEC's Enforcement Program.

Amici recognize that there must be an appropriate balance between the law enforcement interest in punishing wrongdoing, on the one hand, and basic principles of fairness and repose, on the other. Congress, in enacting Section 2462 without the inclusion of a discovery rule, has already struck that balance appropriately in connection with government penalty actions. And, as *amici* describe below, the SEC itself has clearly articulated the salutary principles underlying the policy balance reflected in Section 2462.

A. The SEC Has Consistently Emphasized Prompt Investigation And Prosecution Of Violations.

1. It is a basic tenet of government enforcement, in both the criminal and civil areas, that prompt investigation and enforcement action maximizes deterrence and public respect for the law. Current SEC

Enforcement Director Robert Khuzami has made this point forcefully:

> [W]e have to be as swift as possible. A sense of urgency is critical. If cases are unreasonably delayed, if there is a wide gap between conduct and atonement, then the message — to the investing public that the SEC is vigilant and effective, as well as the message to those who might themselves be considering a step outside the law — is diluted. Timeliness is critical. Corporate institutions are dynamic and ever-changing. People come and go. When a case is brought years after the conduct, the fines and the penalties still hurt, but the opportunity to achieve a permanent change in behavior and culture is greatly reduced.

Robert Khuzami, Testimony Concerning Strengthening the SEC's Vital Enforcement Responsibilities, Before the U.S. Senate Banking, Housing, and Urban Affairs Subcommittee on Securities, Insurance and Investment (May 7, 2009), available at http://www.sec.gov/news/testimony/2009/ts050709rsk.htm, at 6-7.

The SEC's Chairman recently echoed this point, telling Congress that the SEC intended to increase its resources devoted to its enforcement program in order to "help improve our ability to ... act quickly to halt misconduct ... and maximize the deterrent impact of our efforts." Mary L. Schapiro, Testimony Before the Subcommittee on Financial Services and General Government Committee on Appropriations, U.S. House of Representatives (March 6, 2012), available at

http://www.sec.gov/news/testimony/2012/ts030612mls.htm, at 3.

Similarly, in 2001 the then-Chairman of the SEC announced a "real time enforcement" initiative, a policy designed to "better protect investors by acting quickly and effectively." *See* Harvey Pitt, Remarks at the PLI 33rd Annual Institute on Securities Regulation (Nov. 8, 2001), available at http://www.sec.gov/news/speech/spch520.htm, at 2. The Chairman explained that the SEC would seek to "learn of potential violations quickly" and have "wrongdoing ... publicly identified" in a timely way. *Id.*, at 2-3. He also noted that the SEC's companion policy of affording some leniency to companies and individuals who self-report violations and cooperate in investigations in no way altered the agency's commitment to pursue securities fraud "aggressively, and expeditiously." *Id.*, at 3.

The principle of prompt enforcement has in fact been reflected in the agency's practice. The vast majority of SEC penalty actions are brought within five years of a violation, with many commenced much sooner. As Director Khuzami stated last year:

> [W]e are both filing and closing cases more quickly – an 11 percent decrease in the last two years in the average amount of time it takes to file an action; a nearly 10 percent increase in the percentage of actions first filed within two years of the opening of an investigation, and a 33 percent increase in cases closed in fiscal year 2010 and 2009 as compared to previous years. *This trend translates into more timely cases with greater deterrent impact, and a decrease in the*

> *uncertainty for the subjects of our investigations about their status.*

Robert Khuzami, Remarks at SIFMA's Compliance and Legal Society Annual Seminar (March 23, 2011), available at http://www.sec.gov/news/speech2011/spch032311rk.htm, at 2-3 (emphasis added).

Notably, in crafting initiatives to implement the core principle of prompt enforcement action, the SEC has directly addressed the statute of limitations. In 2009, Director Khuzami stated that the SEC staff would no longer seek tolling agreements on a routine basis, explaining that tolling agreements "have become far too common" and often "*impose a significant cost of delay and may undermine our message of prompt accountability for wrongdoing.*" Robert Khuzami, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), available at http://www.sec.gov/news/speech/2009/spch080509rk.htm, at 5 (emphasis added). Director Khuzami's clear message is that effective law enforcement, and any resulting deterrent effects, require that enforcement proceedings be brought close in time to the alleged misconduct.

2. Under the discovery rule engrafted onto section 2462 by the Second Circuit, the statute of limitations for SEC antifraud penalty claims would not begin to run until the agency "knew" or, in the exercise of reasonable diligence, "should have known" of the legal violation. But issues relating to an agency's knowledge of a violation, and/or the reasonableness of its investigatory diligence, are inherently difficult to resolve, and the Second Circuit's decision provides no

guidance on how courts might handle those issues. Thus, the Second Circuit's discovery rule means that the date of commencement of the limitations period will be subject to both significant uncertainty and debate (and ultimately, in many cases, litigation), as well as significant variation.[3] Therefore, as a practical matter, the start of the five-year limitation period could vary widely depending on the nature of the potential violation, the nature of the public and other information available to the SEC even before the start of an Enforcement investigation, the timing and details of the Enforcement staff's investigation, and the views of courts and juries as to the reasonableness of the SEC's actions and investigative decisions over time. To make the limitations period turn on such uncertain, and widely varying, factors makes little sense from either an administrative or an enforcement policy point of view.

---

[3] At one extreme, courts or juries may decline to find that the SEC "knew" or "should have known" of a violation when it had not yet opened an investigation, even if the staff was generally aware of a particular business practice or market event. Under that scenario, the limitations period would not begin to run until some time after the SEC opened an investigation, thus giving the agency potentially limitless time to bring a penalty action. At the other extreme, courts or juries could conclude that the SEC "should have known" of a violation sooner than it did because, in the view of the court or jury, the agency "should have" opened an investigation sooner, or "should have" devoted more resources to the investigation, or "should have" pursued particular leads more aggressively. Under that scenario, the SEC could be surprised to learn that the limitations period began well before the time it believed it had discovered a violation.

Moreover, the Second Circuit's discovery rule would have several practical effects that would undercut the SEC's important message of prompt enforcement action.

First, it could burden the staff with investigations of older conduct, taking limited resources away from investigations of recent conduct. Older conduct is, by definition, more difficult to investigate, given the likelihood of missing documents and the reduced availability and faded memories of witnesses.

Second, by eliminating a clear-cut limitations period in a large class of investigations, a discovery rule would make it difficult for the staff to determine when the statute of limitations has truly run. This uncertainty, in turn, would make it harder for the staff to close investigations, thereby continuing to tie up valuable resources on older investigations.

Finally, there would presumably be an increased number of SEC penalty claims based on older conduct and an increased level of litigation over older conduct. Regardless of the SEC's explanations for the delay, such an increase in older cases would create a serious risk of undermining public confidence in the agency's ability to police the securities markets and their participants in a timely way.

Amici are concerned that these effects will hinder, rather than enhance, the SEC's enforcement efforts, and will blunt the agency's consistent public message of diligent and timely enforcement.

B. A Discovery Rule Would Undermine Principles Of Repose Important To Public Confidence In The Law And The SEC.

This Court has long recognized "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 550 (2000); *see also Campbell v. Haverhill*, 155 U.S. 610, 617 (1895) ("it is a cardinal principle of modern law and of this court ... [that statutes of limitations] are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired."). There is no doubt that these principles are firmly rooted in our system of law and justice, and the public's understanding of that system.

In *amici's* view, the balance between law enforcement's interest in punishing wrongdoing, on the one hand, and basic principles of fairness and repose, on the other, is properly struck by the five-year limitations period articulated by Congress in Section 2462. The SEC, and the courts, are duty-bound to respect the balancing selected by Congress.

Indeed, Congress has recently re-enforced the policy judgment that the SEC should endeavor to act promptly in response to securities law violations. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in 2010, Congress adopted a new provision of the federal securities laws that requires the SEC, for most investigations, to either bring an enforcement action or close its investigation within 180

days after notifying an individual or a company that the SEC staff believes that such person violated the law. *See* Securities Exchange Act of 1934, § 4E(a), 15 U.S.C. § 78d-5(a). Thus, in addition to the five-year limitations period in Section 2462, the Dodd-Frank Act has created another statutory provision requiring the SEC to make final enforcement decisions, and thus eliminate uncertainty for investigatory subjects, in a timely manner.

Ultimately, the statute of limitations for government penalty claims is important not only to defendants and those under investigation, but also to the government. As former SEC commissioners and officials, *amici* believe that the principles of repose and certainty inherent in Section 2462 are important to the public's confidence in the fairness of law enforcement. Like all government law enforcement agencies, the SEC is charged with enforcing the laws in a just and equitable manner, and the principles of repose and certainty embodied in Section 2462 are a significant, and longstanding, part of our system of justice. *See Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (repose inherent in statutes of limitations is "vital to the welfare of society" and "giv[es] security and stability to human affairs").[4]

---

[4] The Department of Justice has stated in an analogous context that "the effective and fair conduct of Government litigation requires that lawsuits be instituted and trials held in reasonably prompt fashion. ... Experience tends to justify the thesis that stale claims are usually neither effective claims nor just claims" and that "potential defendants are entitled to put to one side thoughts of possible suits against them. At some point, and with some exceptions, bygones should be bygones." Hearing on Improvement

Simply put, in the absence of a defendant's fraudulent concealment or a tolling agreement, *amici* believe that the prospect of punishment by the SEC should be put to rest after the five-year limitations period established in Section 2462 has elapsed. For the SEC, or the courts, to be freed from adherence to that limitations period would undermine important principles of repose and certainty that are truly in the public interest, and would damage the public's confidence that the SEC is enforcing the law in an expeditious and timely manner.

C. The Existing Five-Year Limitations Period In Section 2462 Is An Appropriate Period For The SEC To Bring Antifraud Penalty Claims.

Assuming the absence of fraudulent concealment by a defendant, *amici* believe that the five-year limitations period in Section 2462 is a sufficient period of time for the SEC to bring penalty actions, including those based on antifraud statutes.[5] As noted, most SEC penalty

---

of Procedures in Claims Settlement and Government Litigation, House Committee on the Judiciary, 89th Cong., 2d Sess. 6-7 (April 6, 1966) (statement of John W. Douglas, Assistant Attorney General, Civil Division, Department of Justice). The same principle applies with equal force to the SEC as it does to the Civil Division of the DOJ.

[5] *Amici* note that there is no necessary correlation between the difficulty in detecting and establishing a securities law violation and whether the statutory provision "sounds in fraud." As petitioners correctly point out, many "antifraud" statutes enforced by the SEC do not require the agency to prove fraudulent intent in order to establish a violation. *See* Petitioners' Merits Brief at 47-

actions are brought within five years of a legal violation. Penalty actions that are commenced later are usually done so based on a tolling agreement, which acts as a safety valve for extraordinary cases needing more time. Indeed, nothing in the record suggests that major cases requiring punitive action have been missed because of the strict five-year statute of limitations observed in the past.

Even if the SEC believes there are a significant number of securities law violations not involving fraudulent concealment for which a penalty action cannot be brought within five years of the violation, and for which a tolling agreement is not a viable option, this issue is a matter for Congress to address, either through allocation of more enforcement resources to the SEC or consideration of increasing the limitations period in Section 2462.

Moreover, a five-year limitations period for SEC antifraud penalty actions has the benefit of consistency with the maximum five-year limitations period applicable to victims of securities fraud seeking to recover damages, which is not subject to extension via a discovery rule. *See* 28 U.S.C. § 1658(b) (private securities fraud action must be brought "not later than the earlier of – (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.").

---

49. Moreover, many claims that do not involve fraud, such as violations of complex accounting rules, are notoriously difficult to uncover.

* * *

For all the reasons addressed herein, *amici* believe that important issues of agency resources, and the appropriate limitations period for government penalty actions, should not be addressed through application of an implied discovery rule to Section 2462.

II. Applying A Discovery Rule To Section 2462 Could Be Disruptive And Damaging To The SEC Because It Could Subject Its Investigative And Enforcement Processes To Discovery And Second-Guessing.

Amici believe that the Second Circuit's discovery rule could also undermine the SEC's enforcement program because it would likely subject SEC investigative files and personnel to intrusive discovery and second-guessing. The discovery rule makes the knowledge and processes of the enforcement staff relevant to a wide range of penalty cases that "sound in fraud." In any such case, civil discovery rules would likely require the SEC staff to disclose sensitive and confidential information to their adversaries and possibly to the public. Not only would such disclosure of sources and methods potentially compromise investigations, it would inevitably draw federal courts into the subtle and complicated balancing of priorities and resources that is the daily work of administrative agencies. In this way, the discovery rule conflicts with important constitutional principles behind the separation of powers.

A. The Discovery Rule Adopted By The Second Circuit Could Expose Current And Former SEC Staff Members And Investigative Files To Discovery.

Civil discovery in federal cases proceeds according to a broad rule of relevance. *See* Fed. R. Civ. P. 26(b)(1) (permitting discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense."). Items need not be admissible in evidence to be discoverable, and discovery may be taken even for the limited purpose of determining "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." *Id.*; *see generally* Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 Bos. Col. L. Rev. 691, 718-19 (1998).

Under the discovery rule at issue here, those charged with fraud in penalty cases brought by the SEC – or, indeed, by any government agency – would have a complete defense if they could show that the staff knew or should have known of the alleged violation more than five years prior to the filing date. C. Wright & A. Miller, 5 Fed. Prac. & Proc. Civ. § 1270 (3d ed. 2012) (statute of limitations defense "will defeat an otherwise legitimate claim for relief."); *U.S. v. Walsh*, 700 F.2d 846, 856 (2d Cir. 1983) (statute of limitations "limits the government's power to prosecute" a case). The staff's knowledge, as well as what the staff should have known, would be directly relevant to a defense. It would therefore be the subject of discovery. The SEC's investigative files would likely

have to be produced, and current and former SEC investigators would likely be deposed.

Lower courts faced with disputes regarding the scope of discovery of the staff's knowledge are unlikely to be able or willing to limit such discovery. A defendant wishing to depose a current or former SEC official will be able to argue, persuasively, that the official's knowledge involves a potentially dispositive issue, which will make even seemingly burdensome discovery appear necessary. While the Federal Rules permit trial courts to limit discovery that is "unreasonably cumulative or duplicative," or unduly burdensome under the circumstances of a particular case, *see* Fed. R. Civ. P. 26(b)(2), such limitations will be of little practical use with regard to proposed discovery on such a critical issue.

Even where a defendant could not demonstrate a reasonable likelihood that a particular avenue of discovery will lead to admissible evidence that the SEC staff *knew* of the violation at an earlier date, creative attorneys will still be able to argue that the staff, with reasonable diligence, *should have* discovered a particular violation more than five years prior to a filing. To pursue such theories, they will seek discovery about SEC enforcement priorities, budgets, and resource allocations. As with discovery into the actual knowledge of members of the SEC staff, lower courts will not be able to completely deny requests to investigate what the SEC "should have" thought and "should have" done, because the Second Circuit's discovery rule would make a finding about what the staff should have known potentially dispositive as to a critical defense. *See e.g.*, *Bice v. Robb*, 324 Fed.App'x.

79, 81 (2d Cir. 2009) ("The question whether the statute of limitations has run turns on a number of unresolved issues of fact that would benefit from discovery. For this reason, it was error to dismiss on statute of limitations grounds based on the pleadings. The court was obligated to give the plaintiffs the opportunity for full discovery and to determine whether there was a genuine issue as to any material fact relating to timeliness.") (internal quotations omitted).

The very real prospect of intrusive discovery into the SEC's knowledge and diligence is not eliminated by the potential applicability of law enforcement, deliberative process or other privileges. *See, e.g.*, *In re City of New York*, 607 F.3d 923, 944-49 (2d Cir. 2010) (finding that law enforcement privilege protected confidential undercover police reports from disclosure); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citing deliberative process privilege in context of agency decision-making); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (holding that work product doctrine protected documents prepared by SEC attorneys in anticipation of litigation). First, it is not clear how broadly courts would apply these privileges in the context of a statute of limitations defense based squarely on an agency's knowledge. Both the law enforcement and work product privileges may be overcome by a party's showing of need for the protected information and its unavailability from other sources. *See In re City of New York*, 607 F.3d at 945-49; Fed. R. Civ. P. 26(b)(3)(A). And the deliberative process privilege is typically invoked to protect documents reflecting formal agency decision-making, *see Sears*, 421 U.S. 132; *SafeCard*, 926 F.2d at 1203-05, making it unclear

how broadly courts would apply it to less formal staff-level knowledge and communications.

Second, even if applicable to particular documents or information, it is unlikely that any of these privileges would work to totally shield the SEC from discovery into basic factual matters concerning the knowledge and activities of particular staff members at particular points in time. As seen, these factual issues are directly relevant to a defendant's potentially complete defense. Indeed, the court below, in finding that "at this stage in the litigation defendants have not met their burden of demonstrating that a reasonably diligent plaintiff would have discovered this fraud prior to September 2003," Pet. App. 21a-22a, plainly contemplated that defendants in SEC antifraud penalty actions could obtain discovery from the SEC in an effort to "demonstrat[e]" that the agency knew or should have known of the violation more than five years prior to filing the case. Moreover, for a trial court to try to completely block a defendant from inquiring into these matters could risk depriving the defendant of the ability to establish a legally valid defense and, at a minimum, would likely spur lengthy and contentious litigation over discovery issues.

B. Judicial Inquiry Into The Staff's Knowledge Infringes Upon The Constitutional Separation Of Powers And Long-Standing Principles Of Deference To Administrative Agencies.

Litigation in federal court about the staff's knowledge and investigative processes would not be a simple, straightforward or easily resolved matter. *See*

Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."). Among other things, an agency's enforcement decisions involve delicate judgments regarding the proper allocation of resources, the likelihood of success of a particular investigative technique, and whether that likelihood of success justifies the cost. "An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler v. Chaney*, 470 U.S. at 831-832.

Yet the Second Circuit's rule would inevitably draw federal courts into the subtle and complex exercise of deciding when a violation was known to an Executive Branch agency, when that agency should have known that a violation occurred, or even whether the agency should have devoted additional resources to an investigation. These sorts of questions are not a proper subject for judicial inquiry. "An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others." *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994). Examination of these subjects is "more appropriate for a congressional oversight hearing," than litigation in federal court. *Id.*

Fundamental principles, including constitutional separation of powers doctrines, counsel strongly against permitting federal courts to engage in these executive functions, or the legislative task of overseeing executive functions. Under our constitutional structure, the power to take care that the laws be faithfully executed is entrusted to the executive branch. U.S. Const. Art. II. The Second Circuit's discovery rule would inevitably lead to judicial inquiries and findings about what the SEC knew, when the SEC knew it, and even what it should have known, all of which would infringe upon the executive's power to determine how the laws are executed. *See Heckler v. Chaney*, 470 U.S. at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.") (citing *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869)); *see also Baltimore Gas and Elec. Co. v. F.E.R.C.*, 252 F.3d 456, 459 (D.C. Cir. 2001) (citations omitted) ("One aspect of [the executive] power is the prerogative to decline to enforce a law, or to enforce a law in a particular way. When the judiciary orders an executive agency to enforce the law it risks arrogating to itself a power that the Constitution commits to the executive branch."); *3M Co.*, 17 F.3d at 1461 ("We seriously doubt that conducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations.").

C. Public Scrutiny Of SEC Investigative Files Would Jeopardize Effective Enforcement.

The Second Circuit's discovery rule also risks public exposure of sensitive and confidential law enforcement information, techniques, methods and sources. As explained above, federal courts applying that rule will very likely grant defendants discovery of SEC investigative files and personnel. That discovery would include inquiries of the SEC's investigative methods and techniques, including, potentially, sensitive information regarding parallel criminal investigations. While protective orders might limit the extent to which these discovery materials are publicly disclosed, *see* Fed. R. Civ. P. 26(c), the risk that such sensitive matters will be publicly exposed should not be ignored.

Federal law protects the confidentiality of law enforcement information, methods and sources in a variety of contexts, and for very good reasons. For example, this Court has recognized that grand jury proceedings depend upon secrecy, because public disclosure of such proceedings would (1) cause witnesses to "hesitate to come forward" and "testify fully and frankly," (2) permit those under investigation to evade justice; and (3) tarnish the reputation of innocent persons whose conduct may be investigated by a grand jury. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979); *see also* Fed. R. Crim. P. 6(e). Similarly, Congress included in the Freedom of Information Act an exemption from disclosure for "records or information compiled for law enforcement purposes," because it recognized that disclosure of such material could, among other harms, interfere with enforcement investigations and

proceedings, compromise a third-party's right to a fair trial, disclose the identity of confidential sources, or "disclose techniques and procedures for law enforcement investigation or prosecutions" in a manner that could assist a wrongdoer in "circumvent[ing] ... the law." 5 U.S.C. § 552(b)(7).

The Second Circuit's discovery rule risks similar harms. The rule empowers defendants in SEC penalty cases to seek information about what the SEC knew at given points in time, which would certainly include information about the nature and identity of confidential sources and other witnesses. Judicial inquiries into whether the SEC should have known about a fraud sooner would inevitably lead to revelations about the staff's enforcement priorities, techniques, and sources in a way that could compromise the staff's ability to conduct effective investigations. Litigation over the state of the staff's knowledge about a particular matter at a particular point in time could tarnish the reputation of innocent persons whose conduct came to be investigated by the staff, even if those persons were ultimately exonerated. All of these matters traditionally have been kept confidential, and should remain confidential. Because it risks public disclosure of these confidential matters, the Second Circuit's discovery rule could potentially compromise the SEC's ability to enforce the securities laws.

* * *

In the end, the discovery rule articulated by the court below would undermine rather than promote the efficient and effective enforcement of the securities

laws and the public's confidence in the fairness of enforcement efforts. It would also lead to an investigation of the investigators that would encroach on principles of separation of powers and threaten the proper execution of the SEC's enforcement mandate.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

LEE S. RICHARDS
Counsel of Record
ARTHUR S. GREENSPAN
DANIEL L. STEIN
WENDY A. HARRIS
RICHARDS KIBBE & ORBE LLP
One World Financial Center
New York, NY 10281
(212) 530-1800
lrichards@rkollp.com

Counsel for Amici Curiae

November 21, 2012

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: List of *Amici* 1a

LIST OF *AMICI*[1]

The Honorable Paul S. Atkins served as a Commissioner of the SEC from 2002 to 2008.

William R. Baker III served as Associate Director of the Division of Enforcement of the SEC from 1997 to 2002, and as Assistant Director in the Division of Enforcement of the SEC from 1994 to 1997.

Brian G. Cartwright served as General Counsel of the SEC from 2006 to 2009.

John Fedders served as the Director of the Division of Enforcement of the SEC from 1981 to 1985.

The Honorable Joseph A. Grundfest served as a Commissioner of the SEC from 1985 to 1990.

Lawrence Iason served as the Regional Administrator of the New York Office of the SEC from 1988 to 1991.

Herbert F. Janick III served as Assistant Director in the Division of Enforcement of the SEC from 1989 to 1993.

The Honorable Roberta S. Karmel served as a Commissioner of the SEC from 1977 to 1980.

Simon M. Lorne served as General Counsel of the SEC from 1993 to 1996.

---

[1] *Amici* submit this brief in their individual capacities only, and not on behalf of any agency or organization.

Michael D. Mann served as the first Director of the Office of International Affairs of the SEC from 1989 to 1996, and as Associate Director in the Division of Enforcement of the SEC from 1988 to 1989.

David B.H. Martin served as Director of the Division of Corporation Finance of the SEC from 2000 to 2002, and as Special Counsel to the Chairman of the SEC from 1984 to 1985.

Richard M. Phillips served as Assistant General Counsel of the SEC from 1964 to 1968, as Assistant to the Chairman of the SEC in 1964, and as Assistant to a Commissioner of the SEC from 1962 to 1963.

Barry W. Rashkover served as Co-Head of Enforcement and Associate Regional Director of the Northeast Regional Office of the SEC from 2000 to 2004, and as Assistant Regional Director of the Northeast Regional Office of the SEC from 1997 to 2000.

The Honorable Richard Y. Roberts served as a Commissioner of the SEC from 1990 to 1995.

Ira Lee Sorkin served as the Director of the New York Office of the SEC from 1984 to 1986.

The Honorable Laura S. Unger served as a Commissioner of the SEC from 1997 to 2001 and again in 2002, and as acting Chairman of the SEC in 2001.

AMICUS CURIAE BRIEF

No. 11-1274

IN THE

Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JOSHUA L. DRATEL
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
2 Wall St., Third Floor
New York, NY 10005
(212) 732-0707

PAUL R.Q. WOLFSON
Counsel of Record
SHIRLEY CASSIN WOODWARD
JOSHUA M. SALZMAN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE STATUTE OF LIMITATIONS IN GOVERNMENT PENALTY ACTIONS IS NOT EXTENDED BY A DISCOVERY RULE 3

A. Repose Is Particularly Important In The Context Of Penalty Actions 3

1. There is a particularly compelling need for repose in actions where the government seeks to impose punishment 3

2. Allowing adjudication of stale claims substantially compromises factfinders' ability to distinguish between wrongdoers and the wrongly accused 6

3. The justifications proffered for a discovery rule in private lawsuits are much less forceful in penalty actions 10

B. Government Regulators Have The Tools And Resources Necessary To Fulfill Their Functions Without A Discovery Rule 13

TABLE OF CONTENTS—Continued

Page

II. THE SECOND CIRCUIT'S RULE WILL HAMPER THE ABILITY OF INDIVIDUALS AND CORPORATIONS TO ARRANGE THEIR AFFAIRS 17

III. REPOSE FOR PENALTY ACTIONS SUPPLIES AN IMPORTANT CHECK AGAINST ABUSES OF ENFORCEMENT POWER 20

A. The Second Circuit's Rule Will Make It Easier For Regulators To Coerce Defendants Into Settling Non-Meritorious Claims 20

B. The Second Circuit's Approach Gives The Government A New Power That Is Highly Susceptible To Being Used In Arbitrary And Discriminatory Ways 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page(s)

Adams v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) 4

Best Buy Stores, L.P. v. *Developers Diversified Realty Corp.*, 247 F.R.D. 567 (D. Minn. 2007) 19

City of Chicago v. *Morales*, 527 U.S. 41 (1999) 28

FDIC v. *Maxxam, Inc.*, 523 F.3d 566 (5th Cir. 2008) 28

Heckler v. *Chaney*, 470 U.S. 821 (1985) 26

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 10

Johnson v. *SEC*, 87 F.3d 484 (D.C. Cir. 1996) 5, 11

Kolender v. *Lawson*, 461 U.S. 352 (1983) 28

Meeker v. *Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915) 5

Morrison v. *Olson*, 487 U.S. 654 (1988) 26, 27

Pendergast v. *United States*, 317 U.S. 412 (1943) 8

SEC v. *AmeriFirst Funding, Inc.*, No. 07-CV-1188, 2008 WL 1959843 (N.D. Tex. May 5, 2008) 23

SEC v. *Kenton Capital, Ltd.*, 69 F. Supp. 2d 1 (D.D.C. 1998) 23

SEC v. *Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011) 6

SEC v. *Pentagon Capital Management PLC*, No. 08 Civ. 3324, 2012 WL 1036087 (S.D.N.Y. Mar. 28, 2012) 23

TABLE OF AUTHORITIES—Continued

Page(s)

SEC v. *Snyder*, No. CIV. H-03-04658, 2006 WL 6508273 (S.D. Tex. Aug. 22, 2006) 6

SEC v. *Wencke*, 622 F.2d 1363 (9th Cir. 1980) 16

Stogner v. *California*, 539 U.S. 607 (2003) 7

Toussie v. *United States*, 397 U.S. 112 (1970) 3, 4

United States v. *Habig*, 390 U.S. 222 (1968) 4

United States v. *Kubrick*, 444 U.S. 111 (1979) 7

United States v. *Marion*, 404 U.S. 307 (1971) 7, 11

United States v. *Mayo*, 26 F. Cas. 1230 (C.C.D. Mass. 1813) (No. 15,755) 4

United States v. *Powell*, 379 U.S. 48 (1964) 15

United States v. *Scharton*, 285 U.S. 518 (1932) 4

Wilson v. *Garcia*, 471 U.S. 261 (1985) 7

Wood v. *Carpenter*, 101 U.S. 135 (1879) 3, 7

DOCKETED CASES

Securities and Exchange Commission's Memorandum in Support of its Request for Remedies, *SEC* v. *Koenig*, 532 F. Supp. 2d 987 (N.D. Ill. 2007) (No. 02 C 2180), 2006 WL 3608027 23

Plaintiff Securities and Exchange Commission's Post-Trial Memorandum of Law Regarding Imposition of Penalties in the Final Judgment, *SEC* v. *Pentagon Capital Management PLC*, No. 08 Civ. 3324, 2012 WL 1615496 (S.D.N.Y. Mar. 20, 2012) 23

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES, RULES, AND REGULATIONS

15 U.S.C.
§ 49 15
§ 77s(c) 14
§ 77t(d)(2) 22
§ 78u(b) 14
§ 78u(d)(3)(B) 22
§ 80a-41(b) 14
§ 80a-41(e)(2) 22
§ 80b-9(b) 14
§ 80b-9(e)(3) 22

18 U.S.C.
§ 3290 4
§ 3292 4
§ 3301 4

26 U.S.C.
§ 7602 15
§ 7604 15

28 U.S.C. § 2462 ..... *passim*

33 U.S.C. § 1319(d) 22

42 U.S.C.
§ 6928(g) 22
§ 7413(b) 22

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 13, 14

17 C.F.R.
Part 201, Subpart E, Table IV 22
§ 201.1004 22

TABLE OF AUTHORITIES—Continued

Page(s)

40 C.F.R. § 19.4 22

Federal Rules of Civil Procedure
Rule 8 14
Rule 9(b) 14
Rule 11 14

LEGISLATIVE MATERIALS

Strengthening the SEC's Vital Enforcement Responsibilities: Hearing Before the Subcommittee on Securities, Insurance, and Investment of the Senate Committee on Banking, Housing, and Urban Affairs, 111th Cong. (2009) 11

OTHER AUTHORITIES

American Institute of CPAs, *Audit & Attest Standards*, *available at* http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00501.pdf 18

Beasley, James W., Jr., *Report of the Task Force on Statute of Limitations for Implied Actions by the Committee on Federal Regulation of Securities*, 41 Bus. Lawyer 645 (1986) 18, 20

Beccaria, Cesare, *On Crimes and Punishments* (1764) 12

Cohn, Stuart R., 1 *Securities Counseling for Small & Emerging Companies* (2012) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Khuzami, Robert, Director, Division of Enforcement, SEC, *Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement* (Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm 14

Kling, Jacob A., Comment, *Tax Cases Make Bad Work Product Law*, 119 Yale L.J. 1715 (2010) 20

Malveaux, Suzette M., *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 Geo. Wash. L. Rev. 68 (2005) 17

Molot, Jonathan T., *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367 (2009) 19, 20

Morris, Matthew Scott, Comment, *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990*, 7 Admin. L.J. Am. U. 151 (1993) 21

Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. Pa. L. Rev. 630 (1954) 12

Roberts, Mark T., Sean C. Adams, & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, BNA Sec. Reg. & L. Rep. (July 23, 2012), *available at* 2012 WL 2949120 ..... 17, 25

TABLE OF AUTHORITIES—Continued

Page(s)

SEC, Division of Enforcement, *Enforcement Manual* (2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf 13, 15, 16

SEC, *In Brief: FY 2013 Congressional Justification* (Feb. 2012), *available at* http://www.sec.gov/about/secfy13congbudgjust.pdf 14

Spehr, Richard A. & Michelle J. Annunziata, *The Remedies Act Turns Fifteen: What Is Its Relevance Today?*, 1 N.Y.U. J. L. & Bus. 587 (2005) 21

Steinberg, Marc I. & Ralph C. Ferrara, 25 *Securities Practice Federal & State Enforcement* (Westlaw through 2012) 21

The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2d ed. 2007) 19

INTEREST OF AMICUS CURIAE

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit, professional bar association representing public defenders and private criminal defense lawyers across the nation.[1] Founded in 1958, NACDL has a direct national membership of more than 10,000 attorneys and more than 28,000 affiliate members from all fifty states. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice and the defense of individual liberties. NACDL frequently files amicus curiae briefs in this Court in matters pertinent to its mission. As relevant here, NACDL has a strong interest in ensuring that statutes of limitations are properly applied in a manner that will not prevent those accused of misconduct from mounting an effective defense to the charges against them.

SUMMARY OF ARGUMENT

Nowhere are meaningful and definite statutes of limitations more important than in cases where the government acts to punish wrongdoers, including penalty actions governed by 28 U.S.C. § 2462. This Court has long recognized the special importance of repose in criminal cases, and penalty actions similarly seek to punish the defendant rather than remedy a past harm.

---

[1] Both parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

In penalty actions, a defendant's reputation and livelihood are at stake. Yet by effectively expanding the limitations period for fraud actions and thus allowing the government to proceed in cases where vital exculpatory evidence may have disappeared, the decision below substantially increases the possibility that defendants will be unfairly subjected to these sanctions. This risk is particularly unacceptable because in penalty actions there is no countervailing equitable interest in keeping claims alive so as to give an injured party a fair opportunity to obtain compensation, and because the government has the resources and tools necessary to prosecute claims in a timely manner.

Practical business considerations also weigh against construing Section 2462 as incorporating a discovery rule for actions that sound in fraud. The decision of the court of appeals exposes corporations to potentially open-ended liability for past wrongdoing. This, in turn, will inevitably create greater uncertainty that will hamper business transactions, as executives, investors, and professional service providers alike will be unable to reliably ascertain the extent of a company's potential exposure. The absence of repose thus will chill economically beneficial transactions. And the uncertainty engendered will also lead companies to take costly document preservation and other measures in an effort to mitigate the risks created by the Second Circuit's rule, which in turn will consume resources that could be more productively deployed.

Finally, the decision below defangs an important check against prosecutorial abuses. It will empower regulators to pressure defendants into unjust settlements. And it will substantially increase the likelihood that the laws will be applied arbitrarily based on shift-

ing political whims, and discriminatorily against politically disfavored industries, companies, and individuals.

ARGUMENT

I. THE STATUTE OF LIMITATIONS IN GOVERNMENT PENALTY ACTIONS IS NOT EXTENDED BY A DISCOVERY RULE

A. Repose Is Particularly Important In The Context Of Penalty Actions

This Court has long recognized that "[s]tatutes of limitation are vital to the welfare of society and are favored in the law." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). While the social policy favoring repose after passage of time applies to some degree in all kinds of cases, its importance is particularly salient in penalty actions such as those governed by 28 U.S.C. § 2462, where the government acts not to redress a private harm but to identify and punish alleged wrongdoers. In such cases, the importance to the defendant of avoiding stale claims is particularly great, whereas the government's interest in bringing an action long after the occurrence of the underlying facts is considerably diminished.

1. There is a particularly compelling need for repose in actions where the government seeks to impose punishment

This Court has repeatedly recognized the important function that statutes of limitations play in "minimiz[ing] the danger of official punishment because of acts in the far-distant past." *Toussie* v. *United States*, 397 U.S. 112, 115 (1970), *superseded by statute on other grounds*, Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(31), 85 Stat. 348, 352-353. As early as

Chief Justice Marshall's opinion in *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336 (1805), this Court remarked that "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Id.* at 339. This point was echoed by Justice Story, who reiterated that "it would be utterly repugnant to the genius of our laws[] to allow such prosecutions a perpetuity of existence." *United States* v. *Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15,755). Consistent with these holdings, this Court has repeatedly indicated that criminal statutes of limitation are to be "liberally interpreted in favor of repose." *Toussie*, 397 U.S. at 115; *see United States* v. *Habig*, 390 U.S. 222, 227 (1968); *United States* v. *Scharton*, 285 U.S. 518, 522 (1932).

Congress, accordingly, has strictly defined statutes of limitations for many criminal offenses—even those that might be particularly difficult for the government to discover. For example, the statute of limitations for criminal prosecution for a "securities fraud offense" expires "6 years after the *commission of the offense*." 18 U.S.C. § 3301 (emphasis added). The exceptions to these federal criminal statutes of limitations are quite limited and narrow, reflecting Congress's recognition that individuals in our society have a strong interest in being free from the frightening prospect of criminal prosecution after the passage of time. *See id.* § 3292 (suspension of limitations to permit United States to obtain foreign evidence); *id.* § 3290 (statute of limitations does not apply to fugitives from justice). Federal criminal statutes of limitations have not, to amicus's knowledge, been subject to extension under a "discovery rule" on the ground that the government could not have discovered the violation more quickly; rather,

Congress has determined that even criminal prosecutions, which serve a critical public interest, should be pursued in an expeditious manner.

The wise social policy that prevents the government from threatening individuals with "official punishment" for acts in the "far distant past" applies equally to penalty actions governed by Section 2462. Penalty actions share several important and relevant features with criminal prosecutions. First, "a 'penalty,' as the term is used in Section 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson* v. *SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996) (emphasis added); *see Meeker* v. *Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915) (describing "penalty," as used in prior codification of Section 2462, as "something imposed in a punitive way for an infraction of a public law," as opposed to "a liability imposed solely for the purpose of redressing a private injury"). In other words, a government-brought penalty action, like a criminal prosecution but unlike a lawsuit for damages, is intended to identify a person as an offender against society and to punish that person for his wrongdoing, rather than to compensate another individual who has been harmed.

Second, a defendant to a government penalty action faces not just the prospect of a monetary loss but also the public opprobrium of being branded a wrongdoer. Individuals and corporations may find their reputations seriously harmed after they are publicly identified as defendants to such actions. If their defense is unsuccessful, they may also incur collateral consequences that effectively deprive them of their livelihood. Individuals and companies found to have committed viola-

tions of law may, for reasons both practical and legal, be unable to continue to work in their chosen line of business. Even for those exonerated in an enforcement action, the reputational costs can be significant and can make it difficult if not impossible for them to continue to work in their field.

For these reasons, penalty actions are sufficiently analogous to criminal proceedings that Section 2462—like criminal statutes of limitations—should be construed in favor of repose.[2] At the very least, there is no valid basis to *extend* the limitations period—by judicial gloss—beyond that specified by the plain language of the statute.

2. Allowing adjudication of stale claims substantially compromises factfinders' ability to distinguish between wrongdoers and the wrongly accused

This Court has repeatedly recognized that statutes of limitations not only protect the special interest in repose but also serve to avoid the potential prejudice and unfairness to defendants posed by stale evidence. In particular, the critical truth-finding function of the courts is significantly compromised in cases where the evidence has become stale. Statutes of limitations "rest[], in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded

---

[2] Several courts have recognized that penalty actions have at least some of the characteristics of criminal proceedings. *See, e.g.*, *SEC* v. *Kramer*, 778 F. Supp. 2d 1320, 1323 n.3 (M.D. Fla. 2011) ("[T]he Commission's request for a civil penalty undoubtedly lends criminal character to the proceeding."); *SEC* v. *Snyder*, CIV. H-03-04658, 2006 WL 6508273, at *1 (S.D. Tex. Aug. 22, 2006) (recognizing "the quasi-criminal nature of [an SEC penalty action], as well as the gravity of what is at stake for Defendant").

memories or made witnesses or other evidence unavailable." *Stogner* v. *California*, 539 U.S. 607, 615-616 (2003); *see also United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"); *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."), *superseded by statute on other grounds as recognized in Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377-378 (2004). In other words, statutes of limitations "specify[] a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *United States* v. *Marion*, 404 U.S. 307, 322 (1971); *see Wood*, 101 U.S. at 139 ("While time is constantly destroying the evidence of rights, [statutes of limitations] supply its place by a presumption which renders proof unnecessary.").

The dangers of stale evidence are particularly acute in penalty actions. The stakes are far higher than in private civil lawsuits; an erroneous adverse judgment is especially damaging to a defendant when, as a result, he is not only forced to pay a substantial monetary penalty but also wrongly stigmatized with the label of a fraudster.[3] An individual merely accused of

---

[3] One particularly perverse consequence of the decision below is that it gives prosecutors a strong incentive to characterize and charge a wider array of conduct as "fraud," which would be subject to a discovery rule, even if virtually identical conduct would be subject to a strict statute of limitations if charged under a different

fraud in an SEC penalty action will suffer significant if not livelihood-destroying reputational harm, and even individuals who are ultimately exonerated may find their careers ended. By contrast, defendants who are found liable for damages in private securities actions, or who settle such claims, are not subject to the same level of opprobrium and do not suffer the same reputational harms.

Moreover, stale evidence is particularly likely to cause unfair prejudice to innocent defendants in penalty cases. Although penalty actions seek to impose punishment, they are adjudicated under a preponderance-of-the-evidence standard rather than the more defendant-protective standards used in criminal cases.[4] Because of this lower burden of proof, defendants in penalty actions—unlike criminal defendants—often must, as a practical matter, introduce affirmative evidence to

---

label (which might more accurately reflect the government's longstanding enforcement policies). As a consequence, not only will more defendants be subject to charges, but more will be labeled as fraudsters even when the substance of the charge is really regulatory in nature. For example, the government may be more apt to charge a failure to file an accurate Form 10-K with the SEC as fraud rather than as a potentially less-stigmatizing offense. This increased incentive to charge offenses as frauds may also exacerbate the coercion on defendants to settle charges, given the disastrous consequences of losing a fraud charge at trial.

[4] That defendants in penalty actions lack the safeguards given to criminal defendants weighs in favor of treating defendants in penalty actions no worse than criminal defendants for purposes of statutes of limitations. *Cf. Pendergast* v. *United States*, 317 U.S. 412, 418 (1943) (noting, in the course of discussing applicable statute of limitations for criminal contempt, that "[t]here is no reason why this lesser crime, punishable without some of the protective features of criminal trials, should receive" a more lenient limitations period).

establish that their actions complied with the law. In cases alleging violations of complex regulatory regimes, such as the securities laws, where there may be genuine uncertainty whether certain conduct is within the law, such affirmative evidence may often implicate issues of intent and the defendant's contemporaneous understanding of the facts and law. Yet the passage of time can severely undermine the defendant's ability to marshal such evidence, as memories fade, witnesses are no longer available, and documents or other evidence that could establish the defendant's contemporaneous understanding of the facts and the law and thus demonstrate good-faith compliance with the law might no longer be available.

A lengthy statute of limitations places defendants at a significant disadvantage in other ways as well. The SEC and other government agencies have the ability to investigate the facts, including by using compulsory process such as subpoenas, even before suit is filed. *See infra* pp. 14-15; *see also* Pet. Br. 40-41. Defendants, by contrast, do not have compulsory process before litigation commences and may not even know that the government is preparing a case against them until the action is instituted. The government can investigate for years, taking testimony and collecting documents, while the defendant cannot begin to build a defense until the action is in court, at which time critical exculpatory witnesses and evidence might no longer be available. As a consequence the evidence that is likely to be preserved in a long-delayed suit is evidence favorable to the government, not the defense.

3. The justifications proffered for a discovery rule in private lawsuits are much less forceful in penalty actions

Statutes of limitations are not without costs. The price of repose is that otherwise meritorious claims might be barred. In the private damages context, it might be inequitable to apply statutes of limitation inflexibly where doing so could prevent an injured plaintiff from securing compensation for her injuries. But in the context of government penalty actions, where the object is to punish the defendant rather than to redress a plaintiff's injury, this cost of repose to the private plaintiff is not present, whereas the danger of unfairness to the defendant is far greater. In the case of government penalty actions, therefore, equitable considerations do not undercut the strong justifications for strict application of the limitations period.

One rationale offered for the discovery rule in private damages actions is that a plaintiff injured by fraud should have a fair opportunity to seek compensation for that injury. Yet that plaintiff might not be immediately aware of the injury (which is usually an indispensable element of a private right of action) or any basis to connect the injury to a particular defendant. A discovery rule in those circumstances promotes fairness "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part." Br. in Opp. 9 (quoting *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (internal quotation marks and citation omitted)).

In government penalty actions, by contrast, there is no injured party at risk of losing the opportunity to be made whole. And for most statutory violations, damage is not an element of the offense, so the gov-

ernment can proceed immediately after the commission of the violation without needing to establish the scope (or even the existence) of harm resulting from the defendant's conduct. Moreover, the government has significant investigative resources at its disposal, and it can deploy those resources to ferret out wrongdoers whenever it suspects that a violation of law may have occurred. In many circumstances the government does not even need an articulable suspicion to commence an investigation. The government also has significant discretion in deciding how to allocate those resources; indeed it can effectively control when it "discovers" a potential violation by deciding when to pursue an investigation and how urgently to do so. *See* Pet. Br. 39 (noting that the government's discovery of a potential violation is a function of when the government begins to investigate). As a result, in government penalty actions there is no countervailing equitable interest analogous to a tort victim's interest in being able to discover her injury and to be made whole through an award of damages, and certainly nothing comparable to the practical and legal difficulties that confront private individuals who may not even be aware that they may have a basis to seek redress for an injury.

Another reason why public policy strongly favors repose in penalty actions is that the deterrence interests in government enforcement actions diminish over time. *See Johnson*, 87 F.3d at 492 ("In addition, the SEC argues that enforcing § 2462 would hobble efforts to prevent future harm to the public. It is equally likely, however, that once the SEC has delayed more than five years in proceeding against a broker it considers a grave threat to the public, the bulk of the harm has already been done." (internal citation and quotation marks omitted)); *see also Marion*, 404 U.S. at 322-323

(recognizing "the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity"). The SEC itself recognizes timeliness in investigation and enforcement as a high institutional priority. In 2009 testimony before Congress, the Director of the Enforcement Division listed it among four guiding principles for the Division:

> [W]e have to be as swift as possible. A sense of urgency is critical. If cases are unreasonably delayed, if there is a wide gap between conduct and atonement, then the message—to the investing public that the SEC is vigilant and effective, as well as the message to those who might themselves be considering a step outside the law—is diluted. Timeliness is critical. Corporate institutions are dynamic and ever-changing. People come and go. When a case is brought years after the conduct, the fines and the penalties still hurt, but the opportunity to achieve a permanent change in behavior and culture is greatly reduced.

Strengthening the SEC's Vital Enforcement Responsibilities: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. 46 (2009) (statement of Robert Khuzami, Dir., Div. of Enforcement, SEC).[5] The SEC's enforcement manual, recog-

---

[5] The SEC is in good company on this point; legal philosophers have long expressed the view that punishment is most effective when imposed swiftly. *See, e.g.*, Cesare Beccaria, *On Crimes and Punishments* § xix (1764); *see also* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. Pa. L. Rev. 630, 634 (1954) ("The pursuit of only more recent criminals is consistent with that aim of criminal law which

nizing that "[s]wift investigations generally are most effective and enhance the public interest," similarly instructs that SEC "[s]taff should take care not to delay or slow the pace of an investigation based on the potential availability or existence of a tolling agreement." SEC, Div. of Enforcement, *Enforcement Manual* § 3.1.2, at 41 (2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

Congress, too, has recognized the value of timely investigation and enforcement. The recent Dodd-Frank Act imposed new 180-day deadlines, subject to certain exceptions, for the SEC to file (or determine not to file) any enforcement action after the issuance of a Wells notice and to provide notice of the results of a compliance examination or inspection. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929U, 124 Stat. 1376, 1867-1868 (2010).

In short, requiring the government to bring penalty actions within five years of the alleged violation protects fairness through repose, does not leave injured parties without a claim to compensation, and promotes effective deterrence.

B. Government Regulators Have The Tools And Resources Necessary To Fulfill Their Functions Without A Discovery Rule

Requiring government enforcement agencies like the SEC to adhere to a five-year statute of limitations in penalty actions will not undermine the ability of those agencies to fulfill their functions. Those agencies

---

seeks to rehabilitate wrongdoers and serves to free the citizen from vexatious fear of prosecution for old crimes.").

have the resources and tools necessary to enforce the laws without the need for a discovery rule.

Enforcement agencies have extensive resources at their disposal. The SEC's Division of Enforcement, for example, has a staff of nearly 1250 full-time-equivalent employees and a budget of $467 million. *See* SEC, *In Brief: FY 2013 Congressional Justification* 51 (Feb. 2012), *available at* http://www.sec.gov/about/secfy13congbudgjust.pdf. While those resources must be allocated across a wide array of enforcement objectives, they can be brought to bear on whatever investigations and according to whatever priorities the agency determines serves the public interest.

Second, enforcement agencies like the SEC are specially empowered by law to investigate violations *before* the filing of any action. The Commission or members of its staff may subpoena testimony and documents in the course of an investigation,[6] and its subpoenas now have nationwide reach. *See* Dodd-Frank Act, § 929E, 124 Stat. at 1853. Unlike private litigants, therefore, regulators can fully investigate a matter *before* having to meet the fraud pleading standard of Federal Rule of Civil Procedure 9(b), or even the more lenient standards of Rule 8 and Rule 11. Even when it is never exercised, the mere threat of the SEC's muscular subpoena power can effectively force investigated parties to disclose information voluntarily. *See, e.g.*, Robert Khuzami, Dir., Div. of Enforcement, SEC, *Re-*

---

[6] This authority is established by Section 19(c) of the Securities Act, 15 U.S.C. § 77s(c); Section 21(b) of the Securities Exchange Act, *id.* § 78u(b); Section 209(b) of the Investment Advisers Act, *id.* § 80b-9(b); and Section 42(b) of the Investment Company Act, *id.* § 80a-41(b).

marks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm ("[I]f defense counsel resist the voluntary production of documents or witnesses, or fail to be complete and timely in responses or engage in dilatory tactics, there will very likely [] be a subpoena on your desk the next morning."). Other enforcement agencies, such as the IRS and FTC, have similarly broad investigative powers. *See* 26 U.S.C. §§ 7602, 7604 (IRS summons power); 15 U.S.C. § 49 (FTC subpoena power); *see also United States* v. *Powell*, 379 U.S. 48, 57 (1964).

Third, when despite their significant investigative resources regulators are still unable to meet the five-year statute of limitations, they can enter into agreements with investigated parties to toll the statute of limitations. *See, e.g., SEC Enforcement Manual* § 3.1.2, at 39-40. Investigated parties have a strong practical incentive to enter into tolling agreements with federal agencies who are conducting an investigation in order to avoid facing the burden of an immediate penalty action; indeed, the two defendants in this very case agreed to toll the limitation period. The ability of a regulator to negotiate extensions of the limitations period as needed in specific cases obviates any need for a blanket discovery rule. Defendants are also better served by tolling agreements than a discovery rule, because in order to seek such an agreement, the government must give the defendant notice of the investigation, which provides the defendant the opportunity to take steps to preserve evidence that might otherwise have been lost or destroyed.

Finally, even if a regulator is unable to act within the limitations period for bringing a penalty action, the regulator can still safeguard the public interest through

other mechanisms. The district court in this case, for example, held that while the SEC's claims for monetary penalties were time-barred, Section 2462 would not bar the SEC from seeking injunctive relief or disgorgement. Pet. App. 35a. Indeed, the SEC instructs members of its enforcement staff to "[k]eep in mind that certain claims are not subject to the five-year statute of limitations under Section 2462, including claims for injunctive relief and disgorgement." *SEC Enforcement Manual* § 3.1.2, at 41; *see also SEC* v. *Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) (Kennedy, J.) (noting that "[t]he federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws").[7] The application of the five-year statute of limitations for monetary penalties therefore will not impede the efforts of regulators like the SEC to protect the public.

---

[7] Notably, a typical injunction or disgorgement action presents different issues of staleness than a penalty action. Injunctions—such as orders requiring the defendant to comply with securities laws—are forward-looking remedies that are focused not on past misconduct but rather on the extent to which the defendant represents a threat to the public in the future. A defendant can therefore rebut the government's arguments for an injunction with present evidence that he poses no such threat. And while disgorgement is to some degree backward-looking, it does nothing more than strip the defendant of his ill-gotten gains and thus return him to the position he would have occupied but for his misconduct. Because disgorgement is remedial rather than punitive, a defendant can rebut the government's arguments for disgorgement by presenting current evidence that he has returned any wrongfully obtained funds or is otherwise in the same position as he would have been absent a violation. By contrast, penalty actions focus on evidence of past violations; in most cases a defendant cannot as a practical matter avoid liability without access to contemporaneous evidence that may have disappeared or grown stale.

II. The Second Circuit's Rule Will Hamper The Ability Of Individuals And Corporations To Arrange Their Affairs

The Second Circuit's ruling, if adopted, will have adverse practical consequences not only for particular defendants facing penalty actions but also for the public more generally. The court of appeals' discovery rule would create significant uncertainty and risk for corporations, which could never be truly certain whether they were free of the prospect of enforcement actions, as well as for non-culpable market participants. *See generally* Mark T. Roberts et al., *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, BNA Sec. Reg. & L. Rep. (July 23, 2012), *available at* 2012 WL 2949120. This increase in risk and uncertainty—with no countervailing equitable or policy gains—is likely to have adverse effects on the economy.

The Second Circuit's rule will hinder the ability of both corporations and individuals to order their affairs in an efficient and predictable manner. The elimination of repose will make it difficult for defendants to account fully for their potential liabilities in the ordinary course of operations and will accordingly create uncertainty and risk aversion that is harmful to the defendant's business as well as to the market as a whole. *Cf.* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 Geo. Wash. L. Rev. 68, 76 (2005) ("With a limitations system intact, institutions can engage in commercial transactions unencumbered by the risk of litigation and able to structure and plan their affairs.").

The manifestations of this problem are numerous. For example, the prospect of perpetual penalty actions will make it difficult for auditors and accountants to

identify and evaluate future potential liabilities. According to standards promulgated by the American Institute of Certified Public Accountants, auditors must account for liabilities arising from "actual or potential litigation" and must inquire into even "unasserted claims" that present "at least a reasonable possibility of an unfavorable outcome," as long as "management considers [the claims] to be probable of assertion" and has sought "legal counsel." Am. Inst. of CPAs, *Audit & Attest Standards, AU-C* §§ 501.17, .22(c), *available at* http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00501.pdf. The task of attempting to account for claims that could be brought years if not decades after the conduct in question is particularly challenging in complex regulatory contexts like the securities industry, where individuals and corporations may frequently confront uncertainty as to whether certain conduct is within the law. *See* Stuart R. Cohn, 1 *Sec. Counseling for Small & Emerging Companies* § 19:14 (2012) ("[P]ending SEC actions could cause havoc with company balance sheets that must reflect contingent liabilities."). More generally, the perpetual threat of government penalty actions for distant conduct will make it extremely difficult if not impossible for businesses to reliably identify, evaluate, plan for, dedicate resources to, and potentially disclose the possible threat of future enforcement actions. *See* James W. Beasley, Jr., *Report of the Task Force on Statute of Limitations for Implied Actions by the Committee on Federal Regulation of Securities*, 41 Bus. Lawyer 645, 647 (1986) (recognizing that when statutes of limitations are unclear, "managements of publicly held companies, as well as their auditors and attorneys, are frequently unable to assess the impact of possible litigation").

Another adverse consequence of the Second Circuit's rule is that potential defendants will perceive a need to preserve documents indefinitely. Since corporations and individuals may never know which documents might prove to be important evidence in a future investigation, without a clearly defined limitations period they will likely err on the side of caution by preserving everything. This step is not a minor inconvenience. As the Sedona Conference Working Group on Electronic Document Retention & Production has explained, the obligation to preserve documents in anticipation of litigation can "cripple" day-to-day operations unless it is reasonably cabined in scope. *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* cmt. 5.a, at 28 (2d ed. 2007); *see, e.g.*, *Best Buy Stores, L.P.* v. *Developers Diversified Realty Corp.*, 247 F.R.D. 567, 570 (D. Minn. 2007) (cost of storing information from database would be $27,823 per month). An obligation to preserve documents for decades, in case the SEC or another regulator might someday decide to bring a penalty action, is expensive and inefficient and does not bring any countervailing enforcement or public policy benefits. *See supra* Part I.B (explaining lack of enforcement need for a discovery rule).

Third, open-ended exposure to the potential for government penalty actions will vastly complicate corporate due diligence. "Every day, companies that are bought and sold also happen to be parties to litigation and the due diligence required for these corporate transactions inevitably requires examination of the relevant lawsuits." Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367, 391 (2009). But due diligence cannot accurately account for potential future liabilities that may be based on decades-old conduct.

The increased uncertainty created by the court of appeals' rule is likely to chill corporate merger, acquisition, and investment activity—and harm the economy as a whole. *See id.* at 374-375 ("[T]he uncertainty surrounding a significant potential liability may increase a company's cost of capital by depressing its stock price or increasing the interest rate it must pay on its debt."); Beasley, 41 Bus. Lawyer at 647 (explaining that a lack of clarity as to the statute of limitation for securities actions "deprives investors of information adequate for informed evaluation of ... companies' potential liabilities"); Jacob A. Kling, Comment, *Tax Cases Make Bad Work Product Law*, 119 Yale L.J. 1715, 1722 (2010) ("Without the assurances that a litigation risk analysis can provide to potential outside investors, they may be unwilling to purchase the company's securities or enter into a business combination with the company or, if they do so, they may value the company on a 'worst case' basis.").

III. Repose For Penalty Actions Supplies An Important Check Against Abuses Of Enforcement Power

A. The Second Circuit's Rule Will Make It Easier For Regulators To Coerce Defendants Into Settling Non-Meritorious Claims

Statutes of limitations play an important role in preventing the government from forcing targets into unjust settlements of non-meritorious claims. In their absence (or in their near-perpetual extension through a discovery rule), the government can aggregate penalties for violations going back years if not decades, which can make it impossible for many defendants to run the risk of going to trial. This danger is exacerbated by the government's ability—and willingness—to

"stack" alleged violations, resulting in potential penalties so massive that defendants have no realistic choice but to settle. In addition, without statutes of limitations, the government may likewise be able to obtain settlements of non-meritorious present claims by threatening to pursue charges based on conduct from the distant past. The threat of investigation into past conduct may also lead a defendant to forgo a viable defense to present charges.

Many federal statutes, including the securities laws, authorize regulators to seek civil monetary penalties for multiple acts or transactions within an overall course of conduct. For example, under the Securities Act, the Securities Exchange Act, the Investment Advisers Act, and the Investment Company Act, the SEC can seek significant monetary penalties for each "violation" of the statute. But the statutes fail to define a "violation." *See* Marc I. Steinberg & Ralph C. Ferrara, 25 *Securities Prac. Fed. & State Enforcement* § 6:9 (Westlaw through 2012) ("The Remedies Act [which created the penalty provisions]...does not define the term 'violation,' and the legislative history does not discuss whether a course of conduct prohibited by the securities statutes will constitute a single violation or whether each illegal act or transaction will constitute a separate violation."). The SEC therefore can "dramatically increase the maximum penalties that can be imposed" by "characterizing a course of conduct as multiple violations of multiple provisions." *Id.*; *see* Richard A. Spehr & Michelle J. Annunziata, *The Remedies Act Turns Fifteen: What Is Its Relevance Today?*, 1 N.Y.U. J. L. & Bus. 587, 593 n.15 (2005); Matthew Scott Morris, Comment, *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990*, 7 Admin. L.J. Am. U. 151, 183 n.163 (1993). Whereas previously, the SEC

was at least limited to aggregating "violations" over a five-year period, the decision below effectively gives the SEC license to "stack" such charges over a much longer period of time.[8]

The penalties in question are not small change. For individuals, the penalties for violations subsequent to March 3, 2009, range from $7,500 for a "first-tier" violation to $75,000 for a "second-tier" or $150,000 for a "third-tier" violation, where graduation from the first tier to the second requires "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and graduation from the second to the third requires that the "violation directly or indirectly [have] resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 77t(d)(2) (Securities Act); *see id.* §§ 78u(d)(3)(B), 80a-41(e)(2), 80b-9(e)(3) (similar provisions under the other Acts); 17 C.F.R. § 201.1004 and pt. 201, subpt. E, tbl. IV (indexing the penalty amounts for inflation). For corporations, the amounts are substantially higher. *Id.* When multiplied by any number of individual acts or transactions, these penalties add up quickly.

The SEC has in fact sought to "stack" penalties in this fashion. In one enforcement action, the agency requested a monetary penalty of $3,000,000, reaching that

---

[8] "Stackable" penalties are not limited to the securities laws. The EPA, for example, can seek a penalty of $37,500 *per day* for certain violations of environmental statutes, including the Clean Air Act, 42 U.S.C. § 7413(b), the Clean Water Act, 33 U.S.C. § 1319(d), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(g). *See* 40 C.F.R. § 19.4 (indexing statutory penalties for inflation).

figure by multiplying the third-tier penalty of $100,000 by the number of statutes that the defendant allegedly violated and the number of time periods in which he did so. *See* Securities and Exchange Commission's Memorandum in Support of its Request for Remedies at 28, *SEC* v. *Koenig*, 532 F. Supp. 2d 987 (N.D. Ill. 2007) (No. 02 C 2180), 2006 WL 3608027 (explaining that Koenig was liable for five penalties because he violated Section 13(a) of the Exchange Act by filing "false corporate reports" for "each year from 1992 through 1996"); *see also id.* at 26 ("The Commission seeks penalties under a *per violation* approach."). In another enforcement action, the SEC went even further, arguing that the statute permitted penalties of $6.03 and 1.206 *billion* (for the corporate and individual defendants respectively), reaching those figures by multiplying the third-tier penalty amounts by the "10,052 illegal late trades" at issue. Plaintiff Securities and Exchange Commission's Post-Trial Memorandum of Law Regarding Imposition of Penalties in the Final Judgment at 8, *SEC* v. *Pentagon Capital Mgmt. PLC*, No. 08 Civ. 3324, 2012 WL 1615496 (S.D.N.Y. Mar. 20, 2012). And courts have acceded to such requests. *See, e.g.*, *Pentagon Capital Mgmt.*, No. 08 Civ. 3324, 2012 WL 1036087, at *3 (S.D.N.Y. Mar. 28, 2012) (agreeing with the SEC's interpretation of the potential penalty, though declining to impose it); *SEC* v. *AmeriFirst Funding, Inc.*, No. 07-CV-1188, 2008 WL 1959843, at *9 (N.D. Tex. May 5, 2008) (imposing a $1.178 million penalty, calculated by multiplying $2,000 by the number of fraudulently obtained investments); *SEC* v. *Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 17 & n.15 (D.D.C. 1998) (imposing a $1.2 million penalty, calculated by multiplying the third-tier penalty amount by the number of fraudulently obtained investments).

What makes this sort of "stacking" so troubling, and what should caution against expanding the time horizon over which the government can further aggregate charges, is that it allows the government to threaten to seek penalties so massive as to make it practically impossible for a defendant to risk trial. In a complex regulatory regime, even informed individuals and corporations can find themselves, despite their good faith, in non-compliance with the law. Yet the defendant in such a circumstance might have no choice but to settle, given that the potential penalties could destroy her business. Indeed, even a clearly non-meritorious claim might be too risky to challenge. The decision below, which significantly multiplies the government's power to stack alleged violations, creates an unacceptable danger of such coercive actions.

In addition, defendants who are otherwise inclined to contest allegations may find themselves pressured by regulators with threats of additional charges based on conduct from their pasts. A defendant may be led to understand that if he does not accede to the present charges, the government will dig back as far as necessary to discover alternative or additional grounds for a penalty action. When confronted with the prospect of having a motivated prosecutor review his entire career in search of a past infraction, many defendants will doubtless choose to settle even non-meritorious claims. This kind of coercive pressure to settle questionable charges undermines the fairness and integrity of our legal system.

B. The Second Circuit's Approach Gives The Government A New Power That Is Highly Susceptible To Being Used In Arbitrary And Discriminatory Ways

The court of appeals' rule also increases the risk that the government's enforcement power will be deployed in arbitrary and discriminatory ways. The government's enforcement priorities always reflect policy judgments, and those policies and priorities often change over time, as mores and political values change. A particular danger arises when the government is empowered to bring enforcement actions for long-past conduct. Under the Second Circuit's rule, conduct that no one (including the government) might have perceived as illegal at the time, or might have thought sufficiently problematic to be worth pursuing, "may later become the focus of enforcement and prosecutions as policies and media focus shift." Roberts et al., *Will the SEC Have Forever to Pursue Securities Violations?*, at 7.

Even though it is clearly desirable for the government to have flexibility to adjust its enforcement priorities, this flexibility always carries the potential for overreaching and abuse. In our system, that possibility is usually cabined by the reality that agencies will choose *not* to pursue conduct that does not warrant the expenditure of enforcement resources. The court of appeals' decision significantly loosens this important constraint. In particular, the possibility that the government might decide—perhaps motivated by political considerations that make a particular class of defendants momentarily unpopular—to turn its attention suddenly to incidents that took place years before should be deeply worrisome.

This Court has recognized that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing" and that every agency therefore must "not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action requested best fits the agency's overall policies." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985); *see also Morrison* v. *Olson*, 487 U.S. 654, 727-728 (1988) (Scalia, J., dissenting) (quoting then-Attorney General Robert Jackson's statement that "[i]f the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate," and that "[w]hat every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain"). The Second Circuit's ruling vitiates the need to carefully weigh the relative merits of enforcement and the need to limit enforcement actions only to those most "flagrant" violations. Instead, the government will be free to seek punishment, many years later, for conduct that was not thought to be worthy of pursuit at the time it occurred.

The dangers of such "rediscovered" need for enforcement, long after an alleged violation occurred, are similar to those that the Ex Post Facto Clause was designed to prevent. A discovery rule allows the government to pursue and punish conduct that was previously tolerated. As a result, there is a real danger of arbitrary and discriminatory application of the law, as conduct is judged not by norms contemporaneous to the conduct but by current (and often changed) political

and popular values. The Second Circuit's rule exacerbates the danger (which is always present to some degree) that the government's enforcement power will be used to punish "being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." *Morrison*, 487 U.S. at 728 (Scalia, J., dissenting) (again quoting then-Attorney General Jackson). This can happen even in a system with meaningful statutes of limitations:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.

Id. But the possibility that an agency might attempt to unearth a past violation committed by a selected target improves dramatically if the agency can draw on its target's entire career rather than merely the past five years.

Even if line attorneys in federal regulatory agencies will be generally unlikely to pursue politically motivated investigations of their own volition, their agencies are subject to substantial political pressure from Congress and other political actors. The head of an agency who has failed to bring a case—any case—against an individual, corporation, or industry that is being publicly vilified at a given point in time may find herself subject to considerable pressure to bring suit so

that political actors can claim that the government is taking vigorous action against the alleged wrongdoers. *See, e.g.*, *FDIC* v. *Maxxam, Inc.*, 523 F.3d 566, 571-573 (5th Cir. 2008) (recounting political pressure on FDIC to sue director of failed bank).

This Court has recognized in other contexts that statutes raise due process concerns when they "authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999); *see Kolender* v. *Lawson*, 461 U.S. 352, 360 (1983) (striking down law that "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" (internal quotation marks omitted)). The court of appeals' decision, regrettably, creates and exacerbates many of the same risks. Government agencies should not be able to comb the distant past to unearth potential violations that could result in massive monetary liability and social opprobrium. Section 2462 can and should be read to avoid such a troubling result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JOSHUA L. DRATEL
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
2 Wall St., Third Floor
New York, NY 10005
(212) 732-0707

PAUL R.Q. WOLFSON
Counsel of Record
SHIRLEY CASSIN WOODWARD
JOSHUA M. SALZMAN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

NOVEMBER 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 7 - 2012
OFFICE OF THE CLERK

No. 11-1274

IN THE
Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

BRIEF OF OCCUPY THE SEC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

AKSHAT TEWARY
Counsel for Amicus Curiae
1974 State Route 27
Edison, NJ 08817
(732) 287-0080
info@tewary.com

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE DISCOVERY RULE SHOULD APPLY ON JURISDICTIONAL GROUNDS	4
II. THE DISCOVERY RULE SHOULD APPLY FROM A PUBLIC POLICY PERSPECTIVE, IN VIEW OF THE FACT THAT FRAUD CAN EASILY REMAIN UNDETECTED BY THE GOVERNMENT	6
III. THE COURT SHOULD CONSIDER FACTORS BEYOND THE ACTIVITIES OF THE DEFENDANT IN ASSESSING THE APPLICABILITY OF THE DISCOVERY RULE	10
A. Factor One: The Vital Purpose of the Underlying Statute – Protection of the Public Against Fraud – Favors Delayed Accrual Pursuant to the Discovery Rule	13
B. Factor Two: The Practical Ends to be Served by the § 2462 Statute of Limitations are Addressed Even if the Discovery Rule Applies	15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) ..... *passim*

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 17

Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284 (N.D.N.Y. 1986) 13

Badaracco v. United States,
464 U.S. 386 (1984) 4

Costello v. United States,
365 U.S. 265 (1961) 4

Guaranty Trust Co. v. United States,
304 U.S. 126 (1938) 4

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 6

Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342 (1944) 16

Reading Co. v. Koons,
271 U. S. 58 (1926) ..... *passim*

SEC v. Bartek,
No. 11-10594, 2012 WL 3205446 (5th Cir. Aug 7, 2012) 5

SEC v. Gabelli,
653 F.3d 49 (2d Cir. 2011) 11, 17

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 17

United States v. Material Serv. Corp.,
No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471 (N.D. Ill. Sept. 30, 1996) 13

United States v. Mayo,
26 F. Cas. 1230 (C.C.D. Mass. 1813) 13

United States v. Windward,
821 F. Supp. 690 (N.D. Ga. 1993) 13
Wood v. Carpenter,
101 U.S. 135 (1879) 17

STATUTES

15 U.S.C. § 78u-6(h)(1)(B)(iii)..... 5
15 U.S.C. § 80b-6 ..... 1, 13
26 U.S.C. § 6501(c) 17
28 U.S.C. § 2462 ..... *passim*
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) 2
Exchange Act,
15 U.S.C. § 78(i)(f) 5
Sarbanes-Oxley Act of 2002,
18 U.S.C. § 1514(A)(b)(2)(D) 5

OTHER SOURCES

Arthur Levitt & Paula Dwyer, *Take On the Street* (2002) 9
Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (2011) 14, 15
Financial Fraud Enforcement Task Force, About the Task Force, http://www.stopfraud.gov/ about.html (last visited December 2, 2012) 14
Frank Yu & Xiaoyun Yu, Corporate Lobbying and Fraud Detection (Aug. 2007), *available at* http://www.stern.nyu.edu/cons/groups/

content/documents/course_description/uat_025796.pdf 9, 10
James B. Stewart, As a Watchdog Starves, Wall Street Is Tossed a Bone, N.Y. Times, July 15, 2011, *available at* http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html 8
Jason Voss, *Fact File: Annual Budget of the U.S. Securities And Exchange Commission*, Seeking Alpha, Apr. 29, 2012, *available at* http://seekingalpha.com/article/540601-fact-file-annual-budget-of-the-u-s-securities-and-exchange-commission 8, 9
Jesse Bricker, *et al.*, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin (June 2012) 14, 15
Mary Schapiro, Testimony on the President's FY 2012 Budget Request for the SEC Before the United States Senate Subcommittee on Financial Services and General Government, Committee on Appropriations (May 4, 2011), *available at* http://www.sec.gov/news/testimony/2011/ts050411mls.htm 7
Occupy Wall Street, Declaration of the Occupation of New York City (2011), *available at* http://www.nycga.net/resources/declaration... 2

STATEMENT OF INTEREST

Occupy the SEC ("OSEC") is a group within the New York-based Occupy Wall Street movement.[1] OSEC is comprised of concerned citizens, activists, and financial professionals with decades of collective experience working at many of the largest financial firms in the industry. OSEC seeks specific improvements to existing and pending financial services industry legislation and regulations, in addition to evaluating and recommending alternative approaches to banking and finance. Like much of the 99%, we have bank deposits and retirement accounts that are in need of protection through vigorous enforcement of antifraud law by the Securities and Exchange Commission ("SEC" or "Commission") and other federal agencies. OSEC files this amicus brief to express its support for the SEC's position seeking the application of the discovery rule to 28 U.S.C. § 2462, which defines the statute of limitations for antifraud laws like 15 U.S.C. § 80b-6.

The recent financial crisis has manifested the pernicious role that fraudulent practices in the banking and financial sectors played in destabilizing the global economy and jeopardizing the financial position of the average person. Unfortunately, enforcement agencies such as the SEC have been of limited effectiveness in adequately redressing these wrongs. The SEC is

---

[1] Counsel of record for Petitioners and Respondent received timely notice of the intent to file this brief. Blanket letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court by Petitioners and Respondent. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its members made a monetary contribution to the preparation or submission of this brief.

already hampered in its enforcement efforts by numerous impediments, including a limited budget, ever-increasing responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203, 124 Stat. 1376 (2010) and other statutes, and overzealous scrutiny by pro-banking legislators.

The agency's inability to effectively root out fraud will only be exacerbated if this Court fails to recognize the applicability of the discovery rule to § 2462. Such a result would enable untold numbers of fraudsters to eschew liability simply because their frauds remain undiscovered for certain statutory periods of time. Simply put, the Court's endorsement of the discovery rule would greatly promote the interests of justice.

Our governmental system must protect our rights,[2] and we ask the Court to serve the best interests of the people by allowing federal agencies to effectively pursue fraud actions in a reasonable timeframe that takes into account the time necessary to actually discover punishable fraud.

SUMMARY OF ARGUMENT

This case turns on whether 28 U.S.C. § 2462 permits a perpetrator of fraud to eschew enforcement action by a regulatory agency for no reason other than that agency's failure to discover the fraud within a five year limitations period. The Court should hold that § 2462 does not permit such a fundamentally unfair result.

---

[2] *See* Occupy Wall Street, Declaration of the Occupation of New York City (2011), *available at* http://www.nycga.net/resources/declaration/.

That is, the Court should uphold the Second Circuit's ruling, that a discovery rule delays the accrual of the limitations period under § 2462.

Petitioners and their *amici* have argued that only Congress may determine whether the discovery rule applies to § 2462. In making this argument, they ask the Court to place its imprimatur on an interpretation of § 2462 that would enervate the role of the judiciary in interpreting the unstated implications of statutory provisions, which is a function that has been ensconced in American jurisprudence since the nation's founding.

There are many practical reasons why enforcement agencies like the SEC may not discover fraud within a given limitations period, even despite exertion of the utmost diligence. The discovery rule should apply to § 2462 in recognition of these practical constraints.

Prior caselaw also favors the discovery rule. Under relevant precedent, the Court should determine the applicable accrual date for purposes of the § 2462 limitations period by balancing the interests of the government in enforcing the underlying law against the interests of fraud defendants in avoiding liability. The government's interest in promoting the public welfare greatly outweighs any inconveniences placed on fraud defendants, especially in light of the discovery rule's reasonableness component.

ARGUMENT

I. THE DISCOVERY RULE SHOULD APPLY ON JURISDICTIONAL GROUNDS

The Court should defer to principles of jurisdictional forbearance and determine that the discovery rule applies to 28 U.S.C. § 2462. Executive agencies such as the SEC serve important enforcement functions in protecting the public from fraud and manipulation. An unduly restrictive interpretation of § 2462 will infringe on agencies' executive authority and will ultimately hinder them from discharging their regulatory responsibilities in an effective manner.

The United States is not subject to statutes of limitations unless Congress explicitly provides otherwise. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938) (observing that this rule, also known as *quod nullum tempus occurrit regi*, dates back centuries to English common law). The motivation behind this rule is not merely to empower the government, but rather to "preserv[e] the public rights, revenues, and property from injury and loss [despite] the negligence of public officers." *Costello v. United States*, 365 U.S. 265, 281 (1961) (citation omitted). The basic principle that governmental failure to detect wrongs should not foreclose public rights is centuries old. Naturally then, courts have applied heavy presumptions against the imposition of statutes of limitations against the Government in its enforcement of the public interest. *See Badaracco v. United States*, 464 U.S. 386, 391 (1984). This Court must do the same.

The hallowed principle of Separation of Powers also militates in favor of allowing agencies in the executive branch to execute the law, promote the public interest, and in this case, protect investors from fraud. The Petitioners have argued that the actual wording of § 2462 does not explicitly contain a discovery rule component. Pet. Br. 11-14; Cert. Petn. 20-22; *see also SEC v. Bartek*, No. 11-10594, 2012 WL 3205446, at *6 (5th Cir. Aug 7, 2012). However, it can equally be said that § 2462 does not explicitly abrogate a discovery rule standard. The statute is completely silent on the matter one way or the other.

Petitioners have argued that the judicial recognition of a discovery rule in § 2462 would "arrogate[] to the judiciary a power – defining the statute of limitations – that Congress expressly has reserved to itself." Cert. Petn. 10; *see also 3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994) (opining that the issue of a discovery rule is "more appropriate for a congressional oversight hearing" because of "the limited role of the court.") However, there would be no such arrogation here for the simple reason that Congress has failed to address the specific contours of a discovery rule in § 2462, as it has in other contexts. *See, e.g.*, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514(A)(b)(2)(D) (2012) (applying a discovery rule to a 180 day statute of limitation, but without an explicit diligence requirement); Exchange Act, 15 U.S.C. § 78(i)(f) (2012) (confining lawsuits to within one year of discovery, subject to an overarching three-year restriction); Exchange Act, 15 U.S.C. § 78u-6(h)(1)(B)(iii) (confining lawsuits to within three years of discovery, with a reasonable diligence requirement, and subject to an overarching six-year restriction).

In areas of ambiguity such as this, it is the aegis of the judiciary to fill in missing terms in the interests of justice. Petitioners' reasoning would render the judiciary a superfluity (not to mention a brittle mechanism for protecting the guilty behind mere technicalities). The role of the judiciary is to promote the public interest by interpreting statutes, and not to mechanically regurgitate legislative syntax. "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Whether the discovery rule applies to § 2462 is an open question. The Court should expound on § 2462 by finding a discovery component within it, in recognition of the general presumption against statutes of limitations as applied to the government and in deference to executive agencies' enforcement authority.

II. THE DISCOVERY RULE SHOULD APPLY FROM A PUBLIC POLICY PERSPECTIVE, IN VIEW OF THE FACT THAT FRAUD CAN EASILY REMAIN UNDETECTED BY THE GOVERNMENT

The public interest requires the application of the discovery rule to § 2462. Many fraud violations, particularly in the areas of finance and banking, involve sophisticated transactions and elaborate, multi-party deals. Consequently, any misrepresentations in these areas may not be either obvious or easily detectable by the regulatory agency in charge with enforcing anti-fraud laws. That is, fraud may be difficult to detect

even where there is no active concealment by the offender and despite the application of the utmost diligence by the governmental enforcement agency. Thus, public policy favors the application of the discovery rule to enforcement actions under § 2462. Perpetrators of fraud should not benefit from immunity under the statute of limitation simply because of the sophistication or inscrutability of their malfeasance. The example of the SEC is highly illuminative of the difficulties that government agencies can face in detecting fraud in today's complex business world.

The SEC's capacity to detect fraud in the marketplace has been severely hampered by a combination of spending cuts and expanding responsibility. Even before the passage of the Dodd-Frank Act, the SEC was charged with regulating a panoply of financial activities. The SEC's ambit has now been significantly broadened by the Dodd-Frank Act, which required the Commission to conduct over 100 new rulemakings, create five new offices, and prepare over 20 studies and reports. Mary Schapiro, Testimony on the President's FY 2012 Budget Request for the SEC Before the United States Senate Subcommittee on Financial Services and General Government, Committee on Appropriations (May 4, 2011), *available at* http://www.sec.gov/news/testimony/2011/ts050411mls.htm. The SEC has been tasked with

> considerable new responsibilities that will have a significant long-term impact on the agency's workload, including oversight of the over-the-counter (OTC) derivatives market and hedge fund advisers; registration of municipal advisors and security-based swap market participants;

> enhanced supervision of nationally recognized statistical rating organizations (NRSROs) and clearing agencies; heightened regulation of asset-backed securities (ABS); and creation of a new whistleblower program

Id.

Concomitantly, the financial services industry has rapidly expanded in the last two decades, creating an alphabet soup of esoteric products with acronyms like CDO, RMBS, CDS, CLN and TROR. Indeed, due to increased sophistication of the financial markets, fraud can be hard to detect even if the fraudster does not actively conceal her activities. Financial services firms typically maintain voluminous legal documentation in connection with their regulatory and compliance responsibilities. Thus, markers of fraudulent activity may be buried deep within mountains of filings and documents, hidden from ready discovery.

To make matters worse, the SEC's budget has not increased in lockstep with its burgeoning regulatory mandate.[3] The SEC's budget of $1.32 billion is 99.99% smaller than the $18.93 trillion U.S. financial market

---

[3] James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. Times, July 15, 2011, *available at* http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html. The Commission's expanded regulatory footprint under the Dodd-Frank Act will not yield greater operational revenue for the agency. The SEC, like some other agencies, is limited to an annual budget that is predetermined by Congress, even where the agency collects fees and penalties greatly in excess of that budget. Those excess earnings are redirected to the U.S. Treasury. Thus, as a result of the Dodd-Frank Act, the SEC's budget has actually contracted relative to its responsibilities.

that it oversees. Jason Voss, *Fact File: Annual Budget of the U.S. Securities And Exchange Commission*, Seeking Alpha, Apr. 29, 2012, *available at* http://seekingalpha.com/article/540601-fact-file-annual-budget-of-the-u-s-securities-and-exchange-commission. In fact, three individuals whose activities fall under the agency's purview actually earn more than the entire agency's budget: in 2011 Ray Dalio of Bridgewater Associates earned $3.9 billion, Carl Icahn of Icahn Capital Management earned $2.5 billion, and James Simons of Renaissance Technologies earned $2.0 billion. *Id.* The consequence of this mismatch between funding and responsibility is that the SEC is severely overburdened, and as such is ever less capable of discovering fraud in the marketplace. Unfortunately, this also means that perpetrators of financial fraud are more likely than before to escape punishment by mere operation of the statute of limitations.

Moreover, the SEC has been hamstrung by lobbying pressure from Congress and the private sector, which further diminishes the agency's capacity to undertake thorough enforcement investigations. Arthur Levitt has revealed that when he was Chairman of the SEC, bank-friendly members of Congress regularly threatened him with budget cuts unless he scaled back the Commission's activities. *See* Arthur Levitt & Paula Dwyer, *Take On The Street* 131–32 (2002). Private sector lobbying also impedes discovery of fraud by the Commission. Finance professors Frank Yu and Xiaoyun Yu conducted an empirical comparison of financial lobbying expenditure and fraud enforcement rates from 1998 to 2004. Their data revealed that regulators are 38% less likely to discover fraud committed by firms that lobby actively. Corporate Lobby-

ing and Fraud Detection 19 (Aug. 2007), *available at* http://www.stern.nyu.edu/cons/groups/content/documents/course_description/uat_025796.pdf. Furthermore, a financial firm that engages in lobbying is able to evade detection of fraud that it has committed by an average of 117 days. *Id.* at 13. Section 2462's simplistic five-year timeframe, codified two centuries ago, does not account for these complexities, whereas the discovery rule does.

This Court has received several amicus briefs from lobbyists for the financial services industry, including the Securities Industry and Financial Markets Association and the American Bankers Association. As per Yu and Yu's study, the financial lobby has already succeeded in effectively reducing the limitations period for financial fraud by 117 days. The lobby now seeks to utilize this Court as a mechanism to further reduce the limitations period, by the number of days in the discovery period. We exhort the Court to resist these machinations.

III. THE COURT SHOULD CONSIDER FACTORS BEYOND THE ACTIVITIES OF THE DEFENDANT IN ASSESSING THE APPLICABILITY OF THE DISCOVERY RULE

The Court should not restrict applicability of the discovery rule to those instances wherein the fraud defendant has taken some active role in the concealment of the fraud.

The Respondent has advocated for delayed "accrual" of claims under § 2462 in cases where the underlying fraud remains undiscovered despite reasonable dili-

gence. Opp. Cert. 7-8. In contrast, the Petitioners seek to restrict delayed "accrual" to those cases where the defendant took some active role in concealing the harm. Cert. Petn. 11; *see also* Pet. Br. 31. As noted by the Second Circuit in this case, the Petitioners have mistakenly conflated the discovery rule with the doctrine of fraudulent concealment. *SEC v. Gabelli*, 653 F.3d 49, 59 (2d Cir. 2011).

The Petitioners further argue that courts should not look beyond the activities of the defendant in determining whether the discovery rule applies. For instance, above we have asked the Court to consider the various practical difficulties that the SEC faces in detecting fraud, and have suggested that these difficulties warrant delayed accrual for purposes of the § 2462 statute of limitations. Petitioners would argue that these factors, which are unrelated to Gabelli and Alpert's direct actions, should play no role in deciding the statute of limitations timeframe. Petitioners rely on *3M* in support of their assertion that such outside factors are irrelevant. Pet. Cert. Rep. 5 (citing *3M*, 17 F.3d at 1461 ("nothing in the language of Sec. 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.")); *see also* Pet. Br. 46. However, this line of reasoning loses sight of important Supreme Court precedent and the basic purpose of statutes of limitations in the first place.

The Supreme Court has previously stated that, in determining when a cause of action "accrues" for purposes of statutes of limitations, courts should balance i) the general purpose of the underlying statute in question, against ii) the "practical" reasons for

foreclosing claims as time-barred under the statute of limitations.

> We do not think it is possible to assign to the word "accrued" any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other; but the uncertainty is removed when the word is interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.

Reading Co. v. Koons, 271 U. S. 58, 61-62 (1926). Thus, *Reading* establishes a useful two-part test to determine when statute of limitations accrual should begin.[4] The Court should apply these two factors to the question presented in the instant case, which asks when to affix the accrual date under § 2462.

---

[4] While *Reading* did not consider the applicability of the discovery rule to § 2462, that case is nevertheless useful precedent as it delineates the balancing test to apply when determining the inception of "accrual" for purposes of statutes of limitations. The primary issue raised in this case is essentially the same: the timeframe for "accrual" of a particular statute of limitations, § 2462.

A. Factor One: The Vital Purpose of the Underlying Statute – Protection of the Public Against Fraud – Favors Delayed Accrual Pursuant to the Discovery Rule

Antifraud laws such as the Advisers Act provision implicated in this case, 15 U.S.C. § 80b-6, serve a vital function in promoting fair and equitable conduct in the marketplace. The Petitioners' interpretation of "accrual" under § 2462 would reduce the timeframe within which enforcement agencies like the SEC could bring antifraud claims against malefactors. This outcome would greatly hamper that agency's ability to combat fraud in the marketplace, which in turn would frustrate the basic investor protection purpose of § 80b-6. *See United States v. Windward*, 821 F. Supp. 690, 694 (N.D. Ga. 1993) (endorsing the discovery rule so that the underlying environmental protection objectives implicated in that case were not thwarted); *see also Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 288 (N.D.N.Y. 1986); *United States v. Material Serv. Corp.*, No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *11 (N.D. Ill. Sept. 30, 1996).

If the Court endorses the Petitioners' position on accrual under § 2462, a deleterious signal would be sent to the public: that a malefactor can expect to commit fraud free of punishment as long as the agency in charge with enforcement is too overwhelmed, or the fraudulent scheme is too convoluted to lead to discovery. The Petitioners have repeatedly cited a district court case from 1813, *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) for the proposition that a broadened timeframe for the § 2462 statute of limita-

tions would "be utterly repugnant to the genius of our laws." Pet. Br. 36-37; Supp. Cert. Br. 2; Cert. Petn. 29. Curiously, Petitioners' solicitude for the "genius of our laws" seems to exclude our antifraud laws.

The government has a compelling interest in protecting the markets and the public at large from fraud. The area of financial fraud is of particular concern given the catastrophic impact that excesses on Wall Street have had on the global economy in the last few years.

The recent financial crisis is testament to the dire need for aggressive enforcement of antifraud laws. While recessions are cyclical in nature, fraud played a significant role in propelling the onset and exacerbating the severity of the recent financial crisis. The government has recognized the causative role that financial fraud played in the 2008 financial crisis,[5] which has devastated the economic position of multinational conglomerates and poor individuals alike. In particular, mortgage fraud flourished in an environment of collapsing lending standards and lax regulation. A study by the Financial Crisis Inquiry Commission estimated that the total economic loss attributable to mortgage fraud alone between 2005 and 2007 was $112 billion. The Financial Crisis Inquiry Report: Final

---

[5] For instance, the Financial Fraud Enforcement Task Force, a government body comprised of 20 federal agencies, 94 US Attorneys Offices and state and local partners, states on its website that it was created in November 2009 "to hold accountable those who helped bring about the last financial crisis as well as those who would attempt to take advantage of the efforts at economic recovery." About the Task Force, http://www.stopfraud.gov/about.html (last visited December 2, 2012).

Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xxii (2011). The Great Recession, borne largely of acquisitive speculation, mismanagement, negligence and fraud at financial institutions, extinguished nearly 40% of family wealth from 2007 to 2010. Jesse Bricker, *et al., Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances* 17, Federal Reserve Bulletin (June 2012). The inflation-adjusted median household net worth actually regressed back to 1992 levels. *Id.* Stronger government enforcement of various financial and consumer protection laws could have greatly alleviated these public losses.

Even if § 2462 were restricted in scope to time-limiting financial fraud enforcement actions, there would be a compelling interest in an expanded statute of limitations through the imposition of the discovery rule. The fact that § 2462 actually controls the timeliness of a wide swathe of government enforcement actions only serves to underscore the compelling interest that various federal agencies have in protecting the public from fraudsters of various types.

B. Factor Two: The Practical Ends to be Served by the § 2462 Statute of Limitations are Addressed Even if the Discovery Rule Applies

The government clearly has a compelling interest in avoiding the frustration of its antifraud statutes. The remaining inquiry under *Reading* is whether the ends to be served by the § 2462 statute of limitations are relatively more or less compelling, given the circumstances.

Congress does not pass statute of limitations laws such as § 2462 to serve as mere "Get Out of Jail Free Cards" for lucky defendants whose misdeeds remain unnoticed for certain periods of time. Rather, § 2462 and other limitations are in place in recognition of certain statutory "practical ends which are to be served" by such laws. *Reading*, 271 U.S. at 62. Under *Reading*, this Court should weigh those practical ends and consider the reasons why claims are time-barred in the first place. *Id.*

As noted by the Petitioners, statutes of limitations are designed to protect defendants from having to defend claims after "evidence has been lost, memories have faded, and witnesses have disappeared." Cert. Petn. 30; *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). While this is an important objective, it should be of limited concern in today's technologically-advanced society. Section 2462's five year limitation has remained largely unchanged since the 1839 version of the statute. *See 3M*, 17 F.3d at 1462. However, a fraud defendant's capacity to avoid the loss of evidence, memories or witnesses is much stronger now than it was nearly two centuries ago, given the advent of electronic data storage and instantaneous video and telecommunications. A five-year look back period is, for practical purposes, much shorter now than it was in 1839. Technological innovations like hard drives make the maintenance of evidence a virtually cost-free endeavor. Therefore, the practical ends to be served by § 2462 will not be frustrated by the imposition of the discovery rule because evidence is now easier to maintain. That is, even if the discovery rule expands the allowable timeframe for the

pursuit of actions under § 2462, little harm should obtain from that expansion.

The Petitioners have also argued that the discovery rule would lead to an infinite tolling period, Cert. Petn. 28-29, which "would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). This simplistic argument fails to recognize that the judicially-imposed discovery rule involves a reasonableness component, which ends the tolling effect five years from when the government should have discovered the fraud. *See TRW Inc. v. Andrews*, 534 U.S. 19, 30 (2001); *Gabelli*, 653 F.3d at 59. Under the discovery rule, the timeframe for a defendant's potential liability can only be infinite, *a fortiori*, if that outcome is somehow reasonable (which is unlikely).[6]

Petitioners also argue that the discovery rule would undermine the principle of repose, Pet. Br. at 39, which "gives security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). These concerns are misplaced. The discovery rule, as propounded by the Second Circuit and the Respondent, is not inconsistent with the orderly reposal of claims. Indeed, the Respondent does not seek limitless liability. Under its theory, potential claims do find repose: five years from discovery or when discovery should reasonably have occurred. The Petitioners exaggerate matters (and strain credulity) in arguing that the imposition of the discovery rule would bring instability to human affairs.

---

[6] Even if the discovery rule did lead to infinite exposure to liability for fraud, such an outcome would not be as unusual as Petitioners suggest. For instance, in a case involving a fraudulent tax return filed with intent to evade taxes, the Internal Revenue Service can pursue an assessment "at any time," in perpetuity. 26 U.S.C. § 6501(c).

See Pet. Br. at 39. The reposal of claims five years from their actual or constructive discovery is entirely consistent with the orderly extinguishment of stale claims. After all, even under the discovery rule, a reviewing court is required to time-bar claims by the government that are filed beyond the statutory time period if the delayed discovery were unreasonable. *Gabelli*, 653 F.3d at 59.

As noted above, the SEC (like other financial regulatory agencies) is overburdened. The practical consequence of this difficulty is that some fraudsters are left unpunished for no meritable reason other than the mere running of the applicable statute of limitations period before the agency can reasonably discover the fraud. The purpose of statute of limitations laws is not to give carte-blanche immunity for fraud penalties simply because the prosecuting agency is too overburdened to uncover fraud within the requisite timeframe (here, five years). Such windfalls are not one of "those practical ends which are to be served by any limitation of the time within which an action must be brought." *Reading*, 271 U.S. at 62. However, if the Court follows *3M* and the Petitioners' view by only permitting concealment of fraud by a defendant to serve as a basis for delayed "accrual" under § 2462, it will ensconce such unjustifiable windfalls into the law's firmament. In doing so, it will unjustly expand the purview of statute of limitations laws beyond their intended scope.

Stated differently, the question here is not whether factors external to the defendant, such as practical impediments to fraud-discovery by agencies, justify delayed accrual of the statute of limitations. Rather, the issue is, for what policy reasons should claims be time-barred in the first place? Statutes of limitations

like § 2462 are not written for the purpose of giving fraudsters an "out" in case the governmental enforcement authority is too burdened to discover fraud. An agency's reasonable difficulties in detecting fraud should not end up being the sole reason that a fraud action is time-barred. Statute of limitations laws like § 2462 were not written with that end in mind.

Reading basically calls for a balancing of the government's interest, which involves the effective enforcement of antifraud statutes, and the defendant's interest vis-à-vis time-limiting liability. As shown above and in the Respondent's brief, the government's interest is more compelling than that championed by the Petitioners.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to rule in favor of the Respondent and hold that the discovery rule should determine when the government's claim first accrues for purposes of applying the five-year limitations period under 28 U.S.C. § 2462.

December 1, 2012

Respectfully submitted,

AKSHAT TEWARY
Counsel for Amicus Curiae
1974 State Route 27
Edison, NJ 08817
(732) 287-0080
info@tewary.com

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1274

Supreme Court, U.S.
FILED
NOV 16 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOSHUA S. LIPSHUTZ
GIBSON, DUNN &
CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

DANIEL M. SULLIVAN
GIBSON, DUNN &
CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MARK A. PERRY
Counsel of Record
GIBSON, DUNN &
CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae

(Additional Counsel Listed on Inside Cover)

Library of Congress
Law Library

KEVIN CARROLL
SECURITIES INDUSTRY AND
FINANCIAL MARKETS
ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7300

Counsel for Amicus Curiae
Securities Industry and
Financial Markets Association

ROBIN S. CONRAD
RACHEL BRAND
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

QUESTION PRESENTED

"Except as otherwise provided by Act of Congress," any governmental enforcement action must be "commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. The government commenced this enforcement action more than five years after its claims first accrued, and no other statute extends the limitation period. The question presented is whether the district court properly dismissed the government's claims as untimely.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. SECTION 2462 DOES NOT INCLUDE A DISCOVERY RULE 5

A. The Statutory Text Precludes Judicial Implication Of A Discovery Rule 5

B. The Structure Of The Securities Laws Further Precludes Judicial Implication Of A Discovery Rule 10

II. AN IMPLIED DISCOVERY RULE WOULD BE BAD POLICY 17

A. A Discovery Rule Would Weaken The Enforcement Of The Securities Laws 17

B. A Discovery Rule Is Unnecessary 22

C. A Discovery Rule Would Be Harmful To Businesses And Investors 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 6, 22

Aaron v. SEC,
446 U.S. 680 (1980) 12, 16

Andrus v. Glover Constr. Co.,
446 U.S. 608 (1980) 8

Bank of the U.S. v. Daniel,
37 U.S. (12 Pet.) 32 (1838) 7

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 11

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) ..... *passim*

Clark v. Martinez,
543 U.S. 371 (2005) 10

Comm'r v. Acker,
361 U.S. 87 (1959) 17

Cont'l Cas. Co. v. United States,
314 U.S. 527 (1942) 8

Credit Suisse Sec. (USA) LLC v. Simmonds,
132 S. Ct. 1414 (2012) 10

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 13

Janus Capital Grp., Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011) 1, 15

Johnson v. SEC,
87 F.3d 484 (D.C. Cir. 1996) 6

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 9, 13, 26

Leocal v. Ashcroft,
543 U.S. 1 (2004) 10

Lindsey v. Normet,
405 U.S. 56 (1972) 19

Merck & Co. v. Reynolds,
130 S. Ct. 1784 (2010) 1, 9, 23, 26

Morrison v. Nat'l Austl. Bank Ltd.,
130 S. Ct. 2869 (2010) 1, 14

Order of R.R. Telegraphers v. Ry. Express Agency,
321 U.S. 342 (1944) 20

Pinter v. Dahl,
486 U.S. 622 (1988) 11, 13

SEC v. Banca Della Svizzera Italiana,
92 F.R.D. 111 (S.D.N.Y. 1981) 26

SEC v. Bartek,
No. 11-10594, 2012 WL 3205446
(5th Cir. Aug. 7, 2012) 20

SEC v. Jones,
476 F. Supp. 2d 374 (S.D.N.Y. 2007) 6

SEC v. Mohn,
465 F.3d 647 (6th Cir. 2006) 6

SEC v. Shanahan,
646 F.3d 536 (8th Cir. 2011) 28

Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.,
552 U.S. 148 (2008) 11, 12, 16

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 12, 16

Tiffany v. Nat'l Bank of Mo.,
85 U.S. (18 Wall.) 409 (1874) 17

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 23

United States v. Kubrick,
444 U.S. 111 (1979) 20

United States v. Lindsay,
346 U.S. 568 (1954) 7

Upton v. SEC,
75 F.3d 92 (2d Cir. 1996) 28

Va. Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 12

Wilcox v. Plummer,
29 U.S. (4 Pet.) 172 (1830) 7

STATUTES

15 U.S.C. § 77*l* 13

15 U.S.C. § 77m 9

15 U.S.C. § 77www(a) 9

15 U.S.C. § 78i(f) 8

15 U.S.C. § 78r(c) 8, 9

15 U.S.C. § 78t(e) 13

15 U.S.C. § 78u-1(a)(1) 24

15 U.S.C. § 78u-6 25

15 U.S.C. § 80b-6 6

15 U.S.C. § 1679i 8

15 U.S.C. § 7241 13

21 U.S.C. § 335b(b)(3) 8

28 U.S.C. § 1658(b) 8, 9, 26

28 U.S.C. § 2462 ..... *passim*

31 U.S.C. § 3731(b) 8

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 14, 25

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 13

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 13

OTHER AUTHORITIES

Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 Creighton L. Rev. 493 (2004) 22

Black's Law Dictionary (9th ed. 2009) 7

William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69 (2011) 24

Christopher A. Ford, *Knowledge and Notice in Section 10(b) Limitations Law*, 103 Yale L.J. 1939 (1994) 16

Charles Forelle & James Bandler, *The Perfect Payday: Some CEOs Reap Millions by Landing Stock Options When They Are Most Valuable. Luck—or Something Else?*, Wall St. J., March 18, 2006 28

H.R. Rep. No. 101-616 (1990).....23

Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?*, 83 J. Fin. Econ. 271 (2007) 28

Michael J. Kaufman & John M. Wunderlich, *Toward a Just Measure of Repose: The Statute of Limitations for Securities Fraud*, 52 Wm. & Mary L. Rev. 1547 (2011).....16

Robert S. Khuzami, Dir., SEC Div. of Enforcement, My First 100 Days as Director of Enforcement (August 5, 2009) 22

Robert S. Khuzami, Dir., SEC Div. of Enforcement, Speech by SEC Staff: Remarks at Open Meeting—Whistleblower Program (May 25, 2011) 25

Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Monetary Penalties*, 58 Alb. L. Rev. 5 (1994).....20, 21, 22

Erik Lie, *On the Timing of CEO Stock Option Awards*, 51 Mgmt. Sci. 802 (2005).....28

Brian Mahoney, *SEC Matches Last Year's Enforcement Peak With 734 Actions*, Law360, Nov. 14, 2012.....25

Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453 (1997) 20

Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 63237 (Nov. 3, 2010) 19

Mark T. Roche, et al., *Will the SEC Have Forever to Pursue Securities Violations?*: SEC v. Gabelli, 44 Sec. Reg. & L. Rep. 1415 (July 23, 2012).....27

S. Rep. No. 101-337 (1990).....21, 23

SEC, *Annual Report on the Dodd-Frank Whistleblower Program* (2011) 25

SEC, *FY 2013 Congressional Justification* (2012).....24, 25, 26

SEC, Investigations by the Securities and Exchange Commission.....19

SEC, Welcome to the Office of the Whistleblower 25

SEC Div. of Enforcement, *Enforcement Manual* (2012) .....*passim*

Securities Law Enforcement Remedies Act of 1989: Hearings on S. 647 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs, 101st Cong., 2nd Sess. (1990).....21

U.S. Gov't Accountability Office, GAO-11-664, *Securities Fraud Liability of Secondary Actors* (2011).....14

U.S. Gov't Accountability Office, GAO-83-118, *Analysis of SEC's Recommendation to Repeal the Public Utility Holding Company Act* (1983).....14

U.S. Gov't Accountability Office, GAO-95-153, *Financial Market Regulation: Benefits and Risks of Merging SEC and CFTC* (1995).....14

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA files *amicus curiae* briefs in cases that raise legal issues of vital concern to the participants in the securities industry, including in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010).

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct

---

[1] Pursuant to this Court's Rule 37.3(a), all parties consented in writing to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber also filed amicus briefs in *Janus*, *Morrison*, and *Merck*.

Amici curiae represent businesses for which the efficient and fair application of the securities laws is of great consequence. *Amici* recognize that appropriate exercise of the investigatory and enforcement powers afforded by Congress to the Securities and Exchange Commission ("SEC") plays an important role in the regulation of the nation's financial markets to the benefit of investors and other market participants. It is equally true, however, that belated and misdirected enforcement efforts risk undermining the health and stability of our capital markets and of the financial services industry. *Amici* respectfully submit that pursuit of old and stale claims poses a particularly acute threat of governmental overreaching, as Congress has recognized in establishing statutes of limitations and repose for actions involving alleged violations of the federal securities laws. As explained in more detail below, evenhanded adherence to such provisions will best enhance fairness and efficiency and investor welfare. As a result, this Court should apply the five-year statute of limitations in 28 U.S.C. § 2462 as written, without implication of the "discovery rule" requested by the SEC and erroneously approved by the Second Circuit.

SUMMARY OF THE ARGUMENT

This Court has repeatedly emphasized the importance of adhering to the statutory text and structure of the securities laws in order to provide the financial markets and their participants the predictability they require to function properly. In violation of that principle, the Second Circuit engrafted a "discovery rule" onto the five-year statute of limitations applicable to governmental enforcement actions (28 U.S.C. § 2462), transmuting a bright-line rule into a shifting and uncertain inquiry. The Second Circuit's decision contravenes the statutory scheme and constitutes bad public policy.

I. Under Section 2462, the timeliness of an SEC penalty action turns on the date the claim "accrued" or came into existence, not the date on which the SEC asserts it first discovered the alleged fraud.

A. The plain text of Section 2462 does not contain a discovery rule. Congress created two exceptions to the Section 2462 limitations period, neither of which is the discovery rule the SEC seeks. Congress has also incorporated a discovery rule into other statutes of limitations, but did not do so here.

B. Judicially implying a discovery rule is particularly inappropriate in the securities-law context because it invades the proper province of the Legislature, creating uncertainty that Congress may have deemed unwise and unnecessary. This Court has refused to expand securities-law liability where, as here, Congress has not done so itself.

II. Engrafting a discovery rule onto Section 2462 would degrade, not enhance, enforcement of the securities laws. Indefinite extension of the statute of limitations for SEC enforcement actions would lead to perverse incentives, diminish the SEC's enforce-

ment capabilities, and injure innocent businesses and individuals.

A. A discovery rule would weaken enforcement of the securities laws by encouraging the SEC to devote resources to old and stale cases, rather than focusing on its primary enforcement goals—the cessation of recurring misconduct and the prevention of ongoing investor losses. Further, determining the timeliness of SEC penalty actions under a discovery rule would require a fact-intensive inquiry into the SEC's investigative process that would jeopardize the confidentiality on which the SEC relies to perform its enforcement functions.

B. The five-year period provided by Section 2462 is more than enough time for the SEC to discover a securities-law violation and file a complaint. Indeed, it is as long as or longer than the amount of time provided to victims of securities fraud to file private enforcement actions. Discovery rules are traditionally intended to assist tort victims. They are not intended to assist regulatory agencies with vast investigative resources and powers at their disposal to bring enforcement claims.

C. Finally, a discovery rule would create uncertainty in the financial markets by leaving companies, investors and individuals exposed to unending potential liability for conduct they believed, in good faith, to have been lawful.

For each of these reasons, the Second Circuit's decision should be reversed and the district court's judgment dismissing this action as untimely should be reinstated.

ARGUMENT

It is up to Congress, not the courts, to decide whether to adopt a discovery rule for securities-fraud claims—as, indeed, Congress has explicitly done in *other* securities statutes but *not* in Section 2462. Judicial implication of a discovery rule would leave market participants confronted with the indeterminate potential of an SEC enforcement action for long-ago conduct, as well as unpredictable and unquantifiable penalties that turn on a fact-specific inquiry into the adequacy of the SEC's efforts to "discover" the alleged fraud. The Second Circuit's decision should be reversed.

I. SECTION 2462 DOES NOT INCLUDE A DISCOVERY RULE.

The discovery rule that the SEC advocates is contrary to the plain text of Section 2462. Judicially rewriting this straightforward statute to include a discovery rule would be improper in any context, but it is especially inappropriate in the securities-law context where this Court has emphasized the importance of clear and predictable limits to liability. As it has done for the past two decades, this Court should adhere to the text of the securities statutes that Congress has enacted, leaving modifications of those laws to Congress.

A. The Statutory Text Precludes Judicial Implication Of A Discovery Rule.

According to Section 2462, the limitations period for the SEC's penalty action began to run no later than 2002, when the underlying conduct ceased and the SEC's claim came into existence—not in 2003, when the SEC asserts that it first discovered the alleged fraud. Thus, the limitations period had ex-

pired when the SEC filed this case in 2008. Accordingly, the district court properly dismissed it as untimely. Pet. App. 34a–39a.

1. The SEC alleges that petitioners' conduct between 1999 and 2002 violated the Investment Advisers Act ("IAA"), 15 U.S.C. § 80b-6, and seeks civil monetary penalties for those alleged violations. Pet. App. 6a–11a. The IAA, like many federal statutes, does not set forth a specific time period within which the government must institute enforcement actions. In such instances, the five-year limitations period set forth in 28 U.S.C. § 2462 controls. *See 3M Co. v. Browner*, 17 F.3d 1453, 1455 (D.C. Cir. 1994); Pet. App. 17a; *see also SEC v. Mohn*, 465 F.3d 647, 653 (6th Cir. 2006) (applying Section 2462 to an SEC enforcement action seeking civil fines); *Johnson v. SEC*, 87 F.3d 484, 485 (D.C. Cir. 1996) (applying Section 2462 to an SEC action for civil penalties); *SEC v. Jones*, 476 F. Supp. 2d 374, 380 (S.D.N.Y. 2007) (applying Section 2462 to an IAA claim).

Section 2462 is a "default" limitations period that states in its entirety:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Despite this statutory prohibition on courts hearing cases filed more than five years after accrual, the SEC instituted this action in 2008—more than eight

years after the alleged misconduct began and almost six years after it ended. Pet. App. 9a. The SEC sought to excuse this delay by asserting that the claim did not "accrue" under Section 2462 until the agency first "discovered" the alleged wrongdoing, which (according to the SEC) did not occur "until late 2003." *Ibid.*

The plain text of Section 2462, however, precludes the SEC's interpretation. At the time Section 2462's predecessor was first enacted in 1839, the term "accrue" meant the occurrence of the event giving rise to the cause of action, and did not support application of a discovery rule. *See, e.g., Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838) (The "cause of action . . . accrued at the time the mistaken payment was made"); *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172, 181 (1830) (holding that a claim accrues at the moment a violation occurs). That meaning persists today. "In common parlance a right accrues when it comes into existence," not when it is first discovered. *United States v. Lindsay*, 346 U.S. 568, 569 (1954); *see also Black's Law Dictionary* 23 (9th ed. 2009) (defining "accrue" as "[t]o come into existence as an enforceable claim or right").

Section 2462 therefore precludes the discovery rule the SEC seeks because, by its express terms, the limitations period runs from accrual and not discovery. The SEC's enforcement action came into existence no later than 2002, when the events underlying the action ceased—six years before the SEC filed suit. Thus, the SEC's action is untimely.

2. The context of Section 2462 further confirms that the Court should not adopt the discovery rule urged by the SEC. The statute provides two exceptions, neither of which is a discovery rule: First, Sec-

tion 2462 states that the limitations period may be "otherwise provided by Act of Congress." 28 U.S.C. § 2462. It is undisputed, however, that no "Act of Congress" has added a discovery rule to Section 2462 or authorized one for IAA enforcement actions. Second, the five-year limitations period does not apply unless, "within the same period, the offender or the property is found within the United States." *Ibid.* But that exception is not relevant here either. "Where Congress [has] explicitly enumerate[d] certain exceptions," this Court should not imply an additional unenumerated exception. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (citing *Cont'l Cas. Co. v. United States*, 314 U.S. 527, 533 (1942)).

Moreover, when Congress wishes to incorporate a discovery rule into a statute of limitations period—in the securities-law context or otherwise—it does so explicitly. *See, e.g.*, 15 U.S.C. § 77m ("No action shall be maintained . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . ."); *id.* § 77www(a) (one-year discovery rule); *id.* § 78i(f) (same); *id.* § 78r(c) (same); 28 U.S.C. § 1658(b)(1) ("[A] private right of action . . . may be brought not later than . . . 2 years after the discovery of the facts constituting the violation"). Even outside the securities-law context, Congress is explicit about its adoption of a discovery rule for anti-fraud claims. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 1679i (fraudulent practices by credit repair organizations); False Claims Act, 31 U.S.C. § 3731(b) (false claims to the government); Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 335b(b)(3) (fraudulent

practices in connection with certain drug applications).

Importantly, when Congress enacts a discovery rule in the securities-law context, it typically couples the rule with a longer statute of repose in order to place an outer bound on the limitations period. For example, 15 U.S.C. § 77m, which contains the discovery rule described above, also provides that "[i]n no event shall any such action be brought . . . more than three years after" the event triggering liability. *See also id.* § 777www(a) (coupling one-year discovery rule with three-year statute of repose); *id.* § 78i(f) (same); *id.* § 78r(c) (same); 28 U.S.C. § 1658(b)(1), (2) (coupling two-year discovery rule with five-year statute of repose).

In fact, with only one exception, *all* of the causes of action created by the Securities Exchange Act of 1934 ("Exchange Act") originally "include[d] some variation of a 1-year period after discovery combined with a 3-year period of repose." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 (1991); *see also Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1790 (2010) (interpreting a later-enacted limitations period that included an express 2-year discovery rule with a 5-year statute of repose).

In contrast to the legislative determination to couple discovery rules with repose periods, the SEC asks this Court to judicially imply a discovery rule that is unaccompanied by a statute of repose, giving the SEC potentially unlimited time to discover a securities fraud—and then five *more* years to bring an enforcement action. Section 2462 "quite clearly does not extend the period in th[e] manner" proposed by the SEC. *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012).

"Congress could have very easily provided" for the discovery rule the SEC seeks in Section 2462 or elsewhere, "[b]ut it did not." *Simmonds*, 132 S. Ct. at 1419. Neither the text nor context of the statute give any hint of the discovery rule on which the SEC relies. Because "[t]he text of [Section 2462] simply does not support the [SEC's desired discovery] rule," *ibid.*, this Court need go no further to resolve this case. The SEC's action is untimely.

B. The Structure Of The Securities Laws Further Precludes Judicial Implication Of A Discovery Rule.

In the securities-law context, this Court has expressed particular concerns about judicial modifications to the statutory regime because of the direct and potentially serious consequences of such adjustments on market participants. Although Section 2462 is a statute of general applicability and is not limited to securities-law causes of action, any interpretation of that statute of limitations would govern *all* applications of the statute, including the securities-law application at issue here. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("The lowest common denominator, as it were, must govern"); *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n.8 (2004) ("[W]e must interpret the statute consistently . . ."). Viewed through the lens of this Court's recent securities-law jurisprudence, the discovery rule is especially inappropriate.

Over the past 20 years, this Court has increasingly recognized the importance of "pa[ying] close attention to the statutory text in defining the scope of" securities statutes. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 169 (1994) (discussing Section 10(b) of the Exchange

Act, the most well-known of the anti-fraud provisions of the securities laws). The Court has expressed particular concern about the deleterious effects of imposing "unclear" "rules for determining . . . liability . . . in an area that demands certainty and predictability," *id.* at 188 (internal quotation marks omitted), something Congress is better suited to provide. And the Court has cautioned that "[t]he decision to extend [a securities-law] cause of action is for Congress, not for us." *Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148, 165 (2008). In this case, the Court should once again decline to expand the potential for liability under the securities laws beyond the plain text enacted by Congress.

1. In *Central Bank*, the Court held that Section 10(b) did not allow for aiding and abetting liability because "the statutory text," which "controls the definition of conduct covered by § 10(b)," "does not itself reach those who aid and abet a § 10(b) violation." 511 U.S. at 175, 177. The Court refused to consider "whether imposing private civil liability on aiders and abettors is good policy," looking only at "whether aiding and abetting is covered by the statute." *Id.* at 177; *see also id.* at 176 ("Congress knew how to impose aiding and abetting liability when it chose to do so"). Any other outcome, the Court cautioned, would have risked "lead[ing] to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Id.* at 188 (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). It also would have created "'shifting and highly fact-oriented'" results that fail to provide "a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Ibid.* (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755

(1975)); *see also Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1106 (1991) ("The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory . . . that raised such prospects"). Thus, to avoid creating uncertainty in the enforcement of the securities laws, the Court concluded that "the statute itself resolve[d] the case." *Cent. Bank*, 511 U.S. at 178.

A decade later, the Court again hewed to the statutory text when it refused to extend Section 10(b) to encompass so-called "'scheme liability,'" which was not provided in the express language of the statute. *Stoneridge*, 552 U.S. at 159. As it did in *Central Bank*, the Court again pointed to "the potential for uncertainty and disruption" that implying such a rule would create—risks that could "raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *Id.* at 163–64. Moreover, the Court sought to foreclose further judicial expansion of Section 10(b) by declaring that the PSLRA reflected Congress's decision to "accept[ ] the § 10(b) private cause of action as then defined but . . . extend it no further." *Id.* at 166; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007) ("It is the federal lawmaker's prerogative . . . to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§ 10(b) private actions").

The Court's text-focused approach has extended beyond determining the scope of Section 10(b) liability in private actions. For example, the Court has held that SEC enforcement actions require the government to prove scienter. *See Aaron v. SEC*, 446 U.S. 680, 689–95 (1980) (referring to "the plain

meaning" of Section 10(b) as "[t]he most important" determinant of its decision). The Court has also refused to expand the Section 10(b) limitations period by implying an equitable tolling rule that does not appear in the statute's text. *See Lampf*, 501 U.S. at 363. With respect to other securities statutes as well, the Court has carefully followed the text. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 567–68 (1995) (interpreting the meaning of the term "prospectus" under then-Section 12(2) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77*l*(2)); *Pinter*, 486 U.S. at 624–25 (interpreting "seller" for purposes of then-Section 12(1) of the Securities Act, 15 U.S.C. § 77*l*(1)).

2. Even though *Central Bank* and *Stoneridge* addressed the Section 10(b) private action, their animating principle of deference to Congress is equally applicable—if not more so—in the SEC enforcement context because Congress has been particularly active in establishing and adjusting the SEC's enforcement authority.

In recent years, Congress has expressly expanded the SEC's authority several times. The Court's decision in *Central Bank*, for example, prompted Congress to consider the proper scope of aiding and abetting liability when it passed the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA")—which adopted aiding and abetting liability for SEC actions but not for private actions under Section 10(b). *See* 15 U.S.C. § 78t(e). In the Sarbanes-Oxley Act of 2002, Congress expanded the SEC's authority by broadening the financial disclosure obligations of companies and enhancing the penalties for fraud. *See* Pub. L. No. 107-204, sec. 302, 116 Stat. 745, 777 (codified at 15 U.S.C. § 7241). Even more recently, after this Court

held that Section 10(b) of the Exchange Act did not have extraterritorial application, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010), Congress revised the law in an effort to allow the SEC to reach certain extraterritorial securities-law violations. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 929P(b)(2), § 78aa, 124 Stat. 1376, 1865 (2010).

Congress has also commissioned studies of these and other evolving topics regarding securities-law enforcement and design. *See, e.g.*, U.S. Gov't Accountability Office, GAO-83-118, *Analysis of SEC's Recommendation to Repeal the Public Utility Holding Company Act* (1983) (evaluating repeal of the Public Utility Holding Company Act of 1935, which Congress decided against); U.S. Gov't Accountability Office, GAO-95-153, *Financial Market Regulation: Benefits and Risks of Merging SEC and CFTC* (1995) (analyzing potential merger between the SEC and the Commodities Future Trading Commission, which never occurred); U.S. Gov't Accountability Office, GAO-11-664, *Securities Fraud Liability of Secondary Actors* (2011) (considering potential impact of creating a statutory private right of action for aiding and abetting securities law violations).

If courts take it upon themselves to expand the SEC's authority without regard for the limits Congress has established, then Congress would be absolved of its responsibility to reevaluate and (when necessary) adjust those limits. If, on the other hand, courts enforce the securities laws Congress has enacted—as this Court has insisted on doing over at least the last twenty years—then the SEC will continue to ask Congress for new and different laws when it believes they are necessary and appropriate. Congress can then balance competing policy and con-

stituent concerns (in a way that courts in a single case cannot do) and decide whether to agree to those requests. In our system of separated powers, this ongoing dialogue among the executive, judicial, and legislative branches is the proper course of proceeding.

3. In this case, the SEC seeks a special exception to the Section 2462 limitations period for enforcement actions that would allow it to pursue civil penalties more than five years after the alleged securities fraud has ceased. But, even though Congress has enacted several statutes clarifying and expanding the SEC's enforcement authority—and has adopted several securities-law statutes of limitations that expressly contain discovery rules (*see supra*, pp. 8–9)—it has never expanded the Section 2462 limitations period to include the discovery rule the SEC seeks. Nor does it typically enact discovery rules in the securities-law context that are unaccompanied by a statute of repose, as the SEC asks the Court to do here. To the contrary, Congress has consistently fashioned limitations periods more restrictive than the rule the SEC is proposing.

Especially in such circumstances, where Congress has pursued a course *other* than the one the SEC proposes, this Court has not endorsed judicially crafted expansions of securities-law liability. For example, the Court rejected an expansive view of secondary liability under Section 10(b), in part because Congress had provided for a more limited form of the liability under a separate provision of the Exchange Act, Section 20(a). *See Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011). The Court also declined to extend civil liability under Section 10(b) to "merely negligent conduct," because doing so "would run counter to the fact that

wherever Congress intended to accomplish that result, it said so expressly and subjected such actions to significant procedural restraints not applicable to § 10(b)." *Aaron*, 446 U.S. at 690; *see also Cent. Bank*, 511 U.S. at 184 ("[W]hen Congress wished to create . . . secondary liability, it had little trouble doing so") (internal quotation marks omitted).

Further, the SEC's proposed discovery rule would turn an easy-to-apply five-year limitations period into an undetermined length of time that depends on an unpredictable inquiry into when the SEC "should have" discovered the alleged fraud. *See* Michael J. Kaufman & John M. Wunderlich, *Toward a Just Measure of Repose: The Statute of Limitations for Securities Fraud*, 52 Wm. & Mary L. Rev. 1547, 1609 (2011) ("A bright-line rule removes the uncertainty that plagues [the] 'discovery' standard"). That, in turn, would result in precisely the type of "ad hoc" outcomes based on the conduct of others—here, the government's choice of enforcement priorities and its allocation of resources—that this Court has warned against in the securities-law context. *Cent. Bank*, 511 U.S. at 188; *see also Stoneridge*, 552 U.S. at 163–64; Christopher A. Ford, *Knowledge and Notice in Section 10(b) Limitations Law*, 103 Yale L.J. 1939, 1951 (1994) ("Particularly in the field of securities law . . . limitations periods provide repose not only for the allegedly guilty parties but for potentially large numbers of innocent dependents who rely upon the continued financial health of a defendant").

If Congress wished to enact such an amorphous securities-law limitations period, that would be its "prerogative." *Tellabs*, 551 U.S. at 327. And, if it were to do so, it would almost certainly append a statute of repose as well. *See supra*, p. 9. There is no reason for this Court to adopt an unlimited extension

of the securities-fraud limitations period where Congress has not done so—and does not typically do so—itself.[2]

II. An Implied Discovery Rule Would Be Bad Policy.

Even if the text and context of Section 2462 afforded this Court sufficient leeway to adopt the discovery rule requested by the SEC, it should not do so because the rule the SEC advocates is potentially harmful and unnecessary. Although such a rule might lead to more enforcement actions, it would also lead to perverse incentives, diminish the SEC's effectiveness, and injure innocent companies and individuals.

A. A Discovery Rule Would Weaken The Enforcement Of The Securities Laws.

The discovery rule the SEC proposes has the potential to degrade efficient enforcement of the securities laws. As this Court has noted, just because a construction of a statute "[e]xtend[s]" the reach of the securities laws, "it does not follow that the objectives

---

[2] The SEC's proposed discovery rule would also violate the well-established rule of lenity that applies to punitive statutes, whether civil or criminal. *See, e.g., Comm'r v. Acker*, 361 U.S. 87, 91 (1959) ("The law is settled that penal statutes are to be construed strictly") (internal quotation marks omitted); *see also Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 410 (1874). In *Acker*, the Court declined to adopt the IRS's interpretation of the Internal Revenue Code to permit the assessment of a tax penalty where it "fail[ed] to find any expressed or necessarily implied provision or language that" supported the interpretation. *Acker*, 361 U.S. at 91. As it should do here, the Court emphasized the longstanding rule that "one is not to be subjected to a penalty unless the words of the statute plainly impose it." *Ibid.* (internal quotation marks omitted).

of the statute are better served." *Cent. Bank*, 511 U.S. at 188 (referring to "the goals of fair dealing and efficiency in the securities markets"). This case provides a compelling example of that principle.

1. In an enforcement action like this one that the SEC brings more than five years after the events in question, the SEC's proposed discovery rule would place a burden on defendants to prove that the SEC was not diligent in uncovering the alleged fraud earlier. That, in turn, would likely require the targets of enforcement actions to conduct discovery into the SEC's activities, leading to mini-trials of the SEC's investigative process, priorities, and resource-allocation decisions, all within the trial on the merits.

As a practical matter, determining when "the SEC," as a whole, discovered a violation would be fact-intensive and difficult. It is the agency's staff that conducts investigations by issuing orders, seeking documents, and subpoenaing witnesses. SEC Div. of Enforcement, *Enforcement Manual* 31 (2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf (*"SEC Enf. Manual"*). Thus, under the SEC's proposed rule, courts and juries would have to decide whether a lone staff attorney's actions—sending out a single subpoena, or interviewing a single witness, for example—suffice to constitute "knowledge" on behalf of the SEC.

Moreover, the need to resolve such questions points to the possibility of routine and otherwise unnecessary discovery into the SEC's investigative and decisional processes. Such discovery could have deleterious effects on federal investigators, not to mention the companies and individuals that are the subject of investigation and anyone who cooperates with

the SEC. As the SEC has explained: "[I]nvestigations are conducted confidentially to protect evidence and reputations." SEC, Investigations by the Securities and Exchange Commission, http://www.sec.gov/answers/investg.htm (last modified Jan. 19, 2012). Disclosure of confidential information that is not relevant to the merits of the claims alleged in the case could also undermine the SEC's ability to secure assistance from whistleblowers, tipsters, and other uninvolved corporations and individuals. Indeed, the SEC cautions that, at least in certain situations, "disclosure . . . of the Commission's cooperation program . . . would adversely affect related ongoing investigations or proceedings." *SEC Enf. Manual* at 136; *see also* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 63237 at 25–26, 41 (Nov. 3, 2010) (recognizing that disclosure of confidential information could reveal a whistleblower's identity).

According to the Second Circuit, the statute of limitations starts running when the SEC knew or "should have" known of the misconduct. Pet. App. 17a. Under that rule, a target of an SEC investigation seeking to establish a limitations defense will be entitled to discover how and when the SEC obtained its knowledge, even when those facts have no other relevance to the merits of the litigation. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense") (internal quotation marks omitted). A bright-line, five-year limit, on the other hand, eliminates the need for such discovery, permitting the limitations defense to be resolved in an early, dispositive motion.

2. A discovery rule would create other problems for the SEC as well. An action filed five years after a claim has accrued will not likely go to trial for another one to two years. When claims are "allowed to slumber" for that long, often "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944); *see also United States v. Kubrick*, 444 U.S. 111, 117 (1979). This concern is particularly acute in the securities industry, which experiences high employee turnover and cyclical downsizing. Five or more years after an event has occurred, the relevant employees are less likely than employees in other industries to be performing the same job function with the same employer, making the investigation and trial more difficult and costly.

Furthermore, trials conducted so long after the underlying events took place breed disrespect for the legal process, *see* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 481–83 (1997), because they lead to less predictable results and a greater risk of injustice: "As the SEC . . . bring[s] cases that are increasingly distant from the time of the alleged violations, faded memories and the disappearance of evidence may make it harder for the SEC to prove violations (and harder for some innocent defendants to demonstrate their blamelessness)." Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Monetary Penalties*, 58 Alb. L. Rev. 5, 52 (1994); *cf. SEC v. Bartek*, No. 11-10594, 2012 WL 3205446 (5th Cir. Aug. 7, 2012) (per curiam) (affirming dismissal of SEC suit as untimely). To extend the limitations period be-

yond five years, as the SEC urges, would make matters even worse.

A longer discovery rule would also detract from the agency's effectiveness. The SEC's primary enforcement mission is remedial in nature—the cessation of ongoing misconduct and the prevention of recurring offenses that lead to investor losses—not punitive. *See SEC Enf. Manual* at 1. Although Congress decided in 1990 to provide the SEC with the ability to seek civil penalties in order to punish and deter violators, those punitive pursuits were intended to be only a supplement to existing punitive, criminal enforcement of the securities laws, and not a substitute for the SEC's primary civil remedial authority. *See* S. Rep. No. 101-337, at 11 (1990) ("The Committee anticipates that the SEC will not seek or impose a civil money penalty in every case"); *see also id.* at 11–12; *Securities Law Enforcement Remedies Act of 1989: Hearings on S. 647 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 101st Cong., 2nd Sess. 44–45 (1990) (statement of Richard C. Breeden, Chairman, Securities and Exchange Commission) ("[W]here the defendant in a Commission action is also the subject of a criminal prosecution, the imposition of a civil money penalty in the Commission's action may not be needed to achieve deterrence").

Having a firm end date for enforcement actions seeking punitive sanctions encourages the SEC to focus its resources on its core remedial mission—pursuing fresh cases that, if urgently investigated, might prevent investor losses. Engrafting a discovery rule onto Section 2462, on the other hand, would induce the SEC to expend more enforcement resources seeking civil penalties in old and stale cases. *See* Laby & Callcott, *supra*, at 51–52.

In addition, the pursuit of older cases would result in delay in the imposition of sanctions, which is "generally thought to reduce the effectiveness of deterrence against other offenses, both by the offender (who sees no immediate sanction for his misconduct) and by others (who see the offender appearing to get away with his misconduct)." Laby & Callcott, *supra*, at 52. Indeed, the incumbent Director of Enforcement, noting his disapproval of agreements to toll the statute of limitations, stated that delay can "impose a significant cost . . . and may undermine our message of prompt accountability for wrongdoing." Robert S. Khuzami, Dir., SEC Div. of Enforcement, My First 100 Days as Director of Enforcement (August 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509kr.htm; *see also ibid.* (announcing the SEC's intention to be "strategic . . . swift, . . . smart . . . [and] successful" by establishing specialized enforcement units, streamlining management and internal processes, analyzing tips and data to focus on those with the greatest potential for wrongdoing, and creating incentives for individuals to cooperate with the enforcement program).

B. A Discovery Rule Is Unnecessary.

The SEC's proposed discovery rule is also unnecessary. Discovery rules have historically been used to help compensate tort victims, who may not be immediately aware of the fraud that has been perpetrated on them. *See, e.g., 3M Co.*, 17 F.3d at 1460; *see also* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 Creighton L. Rev. 493, 553–60 (2004). "[W]here a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part," the discovery rule suspends the running of the statute of limitations so as to avoid inflicting further injustice

on the tort victim. *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001) (internal quotation marks omitted); *see also Merck*, 130 S. Ct. at 1793–94.

In this case, however, the discovery rule the SEC seeks would not help compensate tort victims. Victims of securities fraud may bring their fraud claims under a separate statute that already includes a discovery rule. *See Merck*, 130 S. Ct. at 1790. Moreover, SEC enforcement actions like this one that seek civil penalties are not even *intended* to compensate fraud victims. Rather, when the SEC seeks civil penalties under the Securities Remedies and Penny Stock Reform Act of 1990, as it does here, its primary purpose is to punish and deter the malefactors, not to compensate the victims. *See* H.R. Rep. No. 101-616, at 19 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1379, 1386 (explaining the need for increased punishments and deterrence); S. Rep. No. 101-337, at 2 ("The legislation addresses the disturbing levels of financial fraud, stock manipulation and other illegal activity in the U.S. markets by authorizing new civil money penalties to deter unlawful conduct by increasing the financial consequences of securities law violations").

Nor does the SEC require a discovery rule to help it discover fraud, as a tort victim does. Unlike a private tort victim, the SEC is a federal agency with significant resources at its disposal, whose "mission is to . . . investigat[e] potential violations of the securities laws." *SEC Enf. Manual* at 1. The SEC has substantial powers and resources available to it that private litigants do not have. For example:

- The SEC's Division of Enforcement alone has an annual budget of more than $500,000,000 and employs more than 1,350 full-time em-

ployees. SEC, *FY 2013 Congressional Justification* 51 (2012), *available at* http://www.sec.gov/about/secfy13congbudgjust.pdf ("*SEC Cong. Just.*"); *see also* William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 149–63 (2011) (the SEC "has emerged in recent years as an expansive and powerful enforcement apparatus").

- Its Office of Compliance, Inspections and Examinations, which conducts on-site examinations of securities brokers, investment advisors and markets, and refers potential violations for enforcement action, has an additional 1,000 full-time employees. *See SEC Cong. Just.* at 52.
- The SEC's Division of Corporation Finance also reviews public company filings in order to assure compliance with financial disclosure and reporting laws. *Id.* at 5.
- The agency draws on the surveillance work of the Financial Industry Regulatory Authority and the Public Company Accounting Oversight Board, among others bodies, to detect potential violations of law. *Id.* at 2.
- Unlike most civil litigants, the SEC also has plenary authority to issue compulsory process to investigate possible violations before commencing suit. *See, e.g.*, 15 U.S.C. § 78u-1(a)(1).

Drawing on all of these resources, "[d]uring FY 2011, the Commission . . . [f]iled 735 enforcement actions—more than ever filed in a single year in SEC history"—and "obtained more than $2.8 billion in penalties and disgorgement." *SEC Cong. Just.* at 1.

And the SEC matched or exceeded those numbers in FY 2012. *See* Brian Mahoney, *SEC Matches Last Year's Enforcement Peak With 734 Actions*, Law360, Nov. 14, 2012, *available at* http://www.law360.com/articles/394051/sec-matches-last-year-s-enforcement-peak-with-734-actions ("The SEC won approximately $3 billion in penalties and disgorgement from a wide variety of enforcement actions in fiscal year 2012.").

In addition, as a result of the Dodd-Frank Act, the SEC offers substantial bounties and other rewards so that insiders with knowledge of fraud and other violations will report them directly to the agency. *See* Pub. L. No. 111-203, sec. 922, 124 Stat. at 1841-49 (codified at 15 U.S.C. § 78u-6). The SEC has stated that this "Whistleblower Program . . . is providing high-quality information regarding otherwise difficult to detect wrongdoing and permitting investigators to focus resources more efficiently." *SEC Cong. Just.* at 1. In 2011, the agency launched 349 enforcement investigations as a result of tips or complaints from outside sources. *Id.* at 28; *see also* SEC, Welcome to the Office of the Whistleblower, http://www.sec.gov/whistleblower (last visited Nov. 15, 2012); SEC, *Annual Report on the Dodd-Frank Whistleblower Program* 5 (2011), *available at* http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf. As the Director of the SEC's Division of Enforcement remarked, "information from whistleblowers will allow us to build stronger cases and move more quickly, thus increasing the chance of stopping frauds early . . . ." Robert S. Khuzami, Dir., SEC Div. of Enforcement, Speech by SEC Staff: Remarks at Open Meeting—Whistleblower Program (May 25, 2011), *available at* http://www.sec.gov/news/speech/2011/spch052511rk.htm.

In light of those resources and powers, the five-year limitations period provided by Section 2462 is sufficient for the SEC to uncover fraud *and* file an enforcement action. Five years is already as long as or longer than the statute of repose provided for every cause of action under either the Securities Act or the Exchange Act. *See Lampf*, 501 U.S. at 359–61. It equals—and often exceeds—the amount of time that *victims* of securities fraud (who do not have investigative powers) have to file private enforcement actions under Section 10(b). *See Merck*, 130 S. Ct. at 1790 (citing 28 U.S.C. § 1658(b)). And, in an unusual case where the SEC does need more time to file an enforcement action, the agency can (and often does) ask the subject of the investigation to consent to a tolling agreement. *See SEC Enf. Manual* at 39. Or the agency can commence a civil action and use federal civil discovery to obtain the evidence needed to prove its claims. *See, e.g., SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 112–13 (S.D.N.Y. 1981) (lawsuit to enjoin transfer of allegedly illegal proceeds pending discovery of the identity of the perpetrators).

The SEC has not shown that any broad category of cases is escaping detection or punishment as a result of Section 2462's five-year statute of limitations. Indeed, the SEC's statistics show that the "average number [of] months between the opening of an investigation and the filing of the first enforcement action arising out of that investigation" is only 20 months—*less than 2 years*. *SEC Cong. Just.* at 28.

In short, the discovery rule the SEC urges this Court to adopt is unnecessary for accomplishing the SEC's securities enforcement goals and unhelpful for compensating the victims of securities fraud.

C. A Discovery Rule Would Be Harmful To Businesses And Investors.

Finally, the SEC's proposed discovery rule would create a cloud of potential liability over every participant in the financial markets. Without a firm endpoint to the limitations period, businesses, investors and individuals would never be certain when their potential exposure to securities liability has passed.

The SEC often looks back at once-widespread market practices and decides that, in retrospect, they were problematic. As a result, many businesses and investors have been caught up in enforcement "sweeps" launched years after the fact.

This case, involving alleged "market timing" of mutual funds, is one example. Petitioners were among dozens of mutual fund advisers who were alleged to have permitted market timing, a common practice that had been the subject of public comment and known to the SEC for years before this action was commenced. *See* Mark T. Roche, et al., *Will the SEC Have Forever to Pursue Securities Violations?*: SEC v. Gabelli, 44 Sec. Reg. & L. Rep. 1415, at 2 n.3 (July 23, 2012) (quoting the government's stipulation in *SEC v. O'Meally*, No. 06-cv-06483 (S.D.N.Y. 2011), that "[b]eginning in the mid 1990s, the SEC knew about the practice of market timing in mutual funds, and the decision was to let the marketplace regulate itself"). It was not until then-New York Attorney General Eliot Spitzer began lawsuits alleging illegal market timing that the SEC decided to launch its own industry-wide enforcement actions. *See id.* at 2.

Other, similar examples include the practice of dating stock options as of a date other than the date they were granted. This practice was once so common and overt that it was identified by an associate

professor of finance in an academic study based on publicly reported data. *See* Erik Lie, *On the Timing of CEO Stock Option Awards*, 51 Mgmt. Sci. 802, 803 (2005); *see also* Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?*, 83 J. Fin. Econ. 271, 274 (2007). After the results of that analysis were reported in *The Wall Street Journal* in 2006,[3] however, the SEC launched dozens of investigations, most of them concerning conduct that ended in 2002 when regulatory changes made the practice infeasible. Many of those who were swept up in the ensuing government litigation had acted in good faith, yet endured years of uncertainty. *See, e.g.*, *SEC v. Shanahan*, 646 F.3d 536, 544–45 (8th Cir. 2011) (finding that director who backdated options acted in good faith based on advice from lawyers, accountants and corporate officers).

This is not to say that the SEC cannot or should not reevaluate the propriety of widespread market practices, or try to prove that they are unlawful. Rather, the point is that the agency should do so in a timely fashion in keeping with its statutory priorities and not dwell on long-cold cases. The longer the SEC waits to condemn conduct deemed acceptable when it occurred, the greater the risk that its actions will be arbitrary (or perceived as such) and disrupt long-settled expectations. *See, e.g.*, *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (vacating an SEC censure be-

---

[3] Charles Forelle & James Bandler, *The Perfect Payday: Some CEOs Reap Millions by Landing Stock Options When They Are Most Valuable. Luck—or Something Else?*, Wall St. J., March 18, 2006, at A1, *available at* http://online.wsj.com/article/SB114265075068802118.html (referring to Lie's research).

cause the agency knew about the practice in question before it occurred and did not condemn it, and therefore the defendant did not have reasonable notice that his conduct was improper).

Under the SEC's proposed discovery rule, companies and individuals who believe that their conduct is lawful—and the entirely innocent persons and entities that transact with them—will never be free from unknown and undiscovered SEC claims. Such uncertainty would raise the cost of business transactions, making due diligence more difficult and inexact, and burdening successor corporations whom the government may seek to hold liable for the conduct of predecessors.

* * *

The discovery rule the SEC proposes would not only contravene the text of Section 2462 and the structure of the federal securities laws, it would make for bad policy—undermining the stability and predictability on which the securities markets and their participants depend, and diminishing the effectiveness of the SEC's enforcement efforts. If the SEC needs more than five years after a fraud takes place to bring a securities fraud enforcement action, then it should seek congressional authority for additional time. In our tripartite system, that is the body with the power to *change* the law. Under extant law, this action is time-barred. The Second Circuit's decision should therefore be reversed, and the district court's judgment of dismissal reinstated.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted.

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105

DANIEL M. SULLIVAN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

MARK A. PERRY
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae

KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7300

Counsel for Amicus Curiae Securities Industry and Financial Markets Association

ROBIN S. CONRAD
RACHEL BRAND
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

November 16, 2012